

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

CHARLES KUEPER,

Plaintiff,

vs.

No. 91-L-734

R.J. REYNOLDS TOBACCO COMPANY,
THE TOBACCO INSTITUTE, INC., and
REESE DRUGS, INC.,

Defendants.

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REPORT OF PROCEEDINGS

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NOVEMBER 20, 1992

Before the HONORABLE ROBERT P. LeCHIEN, Associate Judge,
and a Jury.

APPEARANCES:

MR. BRUCE N. COOK, Attorney at Law,
On behalf of the Plaintiff;

MR. RICHARD E. BOYLE, MR. PAUL G. CRIST,
and MR. RICHARD G. STUHAN,
Attorneys at Law,
On behalf of Defendant R.J. Reynolds Tobacco Company;

MR. LARRY HEPLER, MR. TED MACDONALD,
and MR. JAMES GOOLD,
Attorneys at Law,
On behalf of Defendant Tobacco Institute; and

MR. MICHAEL J. NESTER, Attorney at Law,
On behalf of Defendant Reese Drugs, Inc.

C-012886

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	<u>MARKED</u>	<u>ADMITTED</u>
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O-012889

1 BE IT REMEMBERED AND CERTIFIED that heretofore, on
2 to-wit: Friday, November 20, 1992, being one of the regular
3 judicial days of this Court, the matter as hereinbefore set
4 forth came on for hearing before the HONORABLE ROBERT P.
5 LeCHIEN, Associate Judge in and for the Twentieth Judicial
6 Circuit, State of Illinois, and the following was had of
7 record, to-wit:

8 * * * * *

9 (The following portion of the proceedings were
10 reported by Jean Lechowicz, Official Court Reporter
11 CSR, License #084-003357, RPR.)

12
13 (The following proceedings were had out of the
14 hearing and presence of the jury.)

15 THE COURT: Okay, we're on the record. I want to
16 clarify something. In Mr.-- during Mr. Cook's examination of
17 Mr. Chilcote, Mr. Crist was objecting regarding preemption.
18 I think for clarity in the record, preemption is not, as I
19 understand it, an evidentiary point. I don't think it
20 preserves your record on that issue.

21 A preemption is a defense. It's an issue of
22 jurisdiction of the Court perhaps, but it's not an
23 evidentiary objection. For instance, Mr. Cook was inquiring
24 of the witness regarding how much Mr. Kueper should have been

1 aware of certain specific risks; the causation between
2 smoking and cancer. You objected on the basis of that's
3 preempted because it was in a current context. I don't think
4 that that's at all what preemption means.

5 When it goes to the common law case of negligence,
6 specifically the standards of the state law being vastly
7 different than the purpose of the Federal legislation in its-
8 in what it sought to preempt, and more particularly in
9 material to this case is the issue of contributory
10 negligence. So, I don't think you have a evidentiary
11 objection to that kind of testimony that bears upon a
12 comparative fault analysis, either under assumption of the
13 risk or comparative negligence. So I'm--

14 MR. CRIST: Do you want me to address that, Your
15 Honor?

16 THE COURT: That's kind of the ground rules I want
17 to impose. Yes, certainly, if you wish to clarify something.

18 MR. CRIST: I don't know if this is a matter of
19 clarification as much as it is just making sure the Court
20 understands the position which would bring to this.

21 The Federal Cigarette Labeling and Advertising Act
22 specifies the warning which is required on all cigarette
23 packages since 1966. That Act also has specified the warning
24 which is required on advertising and has done so since 1985.

1 The Act says that that warning is adequate as a matter of law
2 to inform consumers of any relationship between smoking and
3 health.

4 The Act also says that after July of 1969 that there can
5 be no claim and no evidence that the warning was inadequate
6 to inform consumers of any relationship between smoking and
7 health. There can be no attack on the warning. There can be
8 no attack on the advertising. And any claim that Mr. Kueper
9 or any other consumer was not sufficiently apprised is of
10 necessity an attack on the adequacy of that warning, and it
11 is preempted.

12 And in addition to that, Your Honor, this Court, not only
13 in its order in limine but in its prior orders on the motion
14 to dismiss and on the motion for summary judgment, has
15 recognized that and has further said that it is an
16 evidentiary matter.

17 THE COURT: Well, parts of it are.

18 MR. CRIST: Your Honor?

19 THE COURT: Parts of it are. I've precluded-- and
20 I'll repeat myself-- from Mr. Cook from-- from suggesting to
21 the jury that either defendant should have something-- should
22 have done something different by way of warning. That
23 doesn't change the realm of evidence that is admissible to
24 show what kind of knowledge Mr. Kueper had.

1 I mean you mentioned in your opening statements that the
2 plaintiff quit smoking for reasons unrelated to health and
3 just decided to quit. If you're going to say that this
4 preemption is a evidentiary point, then you can't bring up
5 any of his conduct after 1969, which would be ridiculous,
6 right? I think to a certain extent his conduct in smoking
7 after 1969 in comparing it to the knowledge of the industry
8 about risks is inherently intertwined in this case. And you
9 can't pick on his decisions while separating them from the
10 industry's decision.

11 MR. CRIST: Well, Your Honor, see I fundamentally
12 disagree with that.

13 THE COURT: Well I know you do, but I'm pointing out
14 that that's where we're headed.

15 MR. CRIST: Well, let me-- well-- well, I mean if
16 Your Honor's decision is firm on that, so be it, we'll move
17 on. I don't mean to belabor this point. But essentially I
18 think what the Court is telling us is that we have an
19 adequate warning and that Mr. Kueper decided to smoke in the
20 face of that, which now means that Mr. Cook can come in and
21 say "Because you have said it was an adequate warning, I'm
22 now entitled to say that it was not adequate to inform Mr.
23 Kueper and other consumers of it".

24 And if that's the Court's ruling, that our taking of the

1 position that the law is what the law is, it somehow opens
2 the door for him to say "Yeah, but so what".

3 THE COURT: I'm not making a ruling that Mr. Cook
4 can say "You really should have changed your warning to say
5 that these cigarettes have a specific risk amount required to
6 be warned by Congress". We're not even attacking anything
7 that Congress required after '69. That's not what he's going
8 to be permitted to get into.

9 But what I'm going to is his-- you've raised comparative
10 fault. This evidence comes in as admissible on that point.
11 This kind of evidence comes in admissible on that point, but
12 not particularly as an attack on the warnings but rather as
13 to his mental state in-- on other issues of this common law
14 case that is distinct from preempted Federal regulations.
15 Congress had no intent to change what evidence is admissible
16 in comparative fault.

17 So, in that sense we'll move on.

18 MR. CRIST: I submit that what the Court's ruling is
19 is that despite the fact that the Act says, despite the fact
20 that the Supreme Court of the United States says that is
21 adequate as a matter of law. And Mr. Cook is going to be
22 entitled to show that with respect to Mr. Kueper and with
23 respect to others perhaps that it wasn't adequate to its
24 purpose.

1 THE COURT: How else does he counter your contrib
2 defense?

3 MR. CRIST: Your Honor, that's the law.

4 THE COURT: He can't?

5 MR. CRIST: That he cannot-- if he cannot overcome
6 what is a preclusive legal barrier--

7 THE COURT: Then I should strike it. I should
8 strike your contrib defense if he can't put evidence on his
9 side of the point.

10 MR. CRIST: Then perhaps you might have directed in
11 our favor on the contrib defense. But he's not entitled to
12 attempt to overcome that because it impeaches the warning
13 which Congress and the Supreme Court have said is adequate.

14 THE COURT: All right. I think I can very briefly
15 state this. Federal regulation had in this area that
16 preempts states from taking action contrary to Federal law or
17 taking action that didn't intrinsically bound up with the
18 Federal law, does not reach issues of comparative fault. And
19 let's more or less get on with this.

20 MR. CRIST: Your Honor, Your Honor--

21 THE COURT: Are we going to close this door again
22 because of noise?

23 MR. CRIST: Your Honor, I'm not sure that we'll
24 always be able to draw the distinction of some questions that

1 are asked that you have just made.

2 THE COURT: I know.

3 MR. CRIST: Could I ask that we could have a
4 standing objection to any questions which go to that, post-
5 July of 1969?

6 MR. COOK: My problem with that, Judge, is that
7 since there-- since we can't always draw the line, I think
8 that you ought to object so that the Court has the
9 opportunity to draw the line on the individual questions.
10 I'm going to try and be very careful about this. And I mean
11 I think we all three agree that the line is going to be
12 somewhat nebulous. And so I think that the Court must be
13 afforded an opportunity to-- and I'll stay away from it as
14 much as possible to consider any questions.

15 What I'm saying is, I'm not saying you have to make a
16 continuing argument, but I would prefer that you would object
17 to the question.

18 MR. CRIST: I'm concerned, Your Honor, in part about
19 disrupting the proceedings here--

20 MR. COOK: Oh, I don't mind your objections.

21 MR. CRIST: --when we're approaching the bench, and
22 I think that the Court is getting somewhat aggravated by
23 that.

24 MR. COOK: I don't think we have to approach the

1 bench, but the one thing I would like is that you record your
2 objection.

3 THE COURT: Well, I think it was the concurring
4 opinion that said that in Cipollone that trial courts had
5 their hands full in trying to sort these issues out and in
6 drawing the line that we've talked out. Certainly I want
7 your record to be as suited to preserving this issue as
8 possible without unduly interrupting the course of the trial.

9 I don't think I can require or impose a standard or a
10 standing objection to it without stipulation. So, I guess
11 as a shorthand way of referring to it, you can continue to
12 interpose your objection that you believe that this area is
13 preempted. And if there's some further need to discuss it,
14 because I want your input to draw the line between what I've
15 said and what you've said, then we can take a minute or two
16 to do that.

17 MR. CRIST: Your Honor, let me just note for the
18 record, that in addition to that matter that at some point in
19 time I've got a couple of housekeeping matters that I would
20 like to take care of.

21 MR. MacDONALD: Your Honor, for the record, T.I.
22 would join in the position of the objection of Reynolds on
23 the preemption issues. We believe it also would apply to
24 T.I. because of the derivative of the liability that the

1 Court has recognized.

2 MR. NESTER: Judge, I also join in that motion.

3 THE COURT: All right, then Mr. Mondzak, would you
4 ask the jury to step out and then you can open court.

5 (The following proceedings were had in the presence
6 of the jury.)

7 THE COURT: Good morning.

8 THE JURORS: Good morning.

9 THE COURT: Mr. Chilcote, I believe your examination
10 continues, and let me remind you that you're still under
11 oath. If you'd like, could we provide him with a larger
12 glass of water?

13 You may proceed.

14 MR. COOK: Thank you, Your Honor.

15
16 (The cross examination of Mr. Chilcote by Mr. Cook
17 continued as follows.)

18 CONTINUED CROSS EXAMINATION

19 BY MR. COOK:

20 Q. Mr. Chilcote, when we concluded last evening we
21 were talking about the Surgeon General, and I had handed you
22 Plaintiff's Exhibit No. 1B and had asked you to read the
23 first paragraph in the 1964 Surgeon General's Report with
24 reference to lung cancer.

1 Would you read that to the jury, please?

2 MR. CRIST: Your Honor, I think I objected to this,
3 and I don't recall the Court's ruling on it.

4 THE COURT: I overruled the objection for the
5 purposes of impeachment.

6 THE WITNESS: "Cigarette smoking is casually related
7 to lung disease in men with magnitude to the affect of
8 cigarette smoking far outweighs all other factors. That data
9 for women, although less extensive, point in the same
10 direction."

11 Q. (Mr. Cook) Now when you said "casually", you meant
12 causally, didn't you?

13 A. Yes, sir.

14 Q. Causally.

15 A. Causally.

16 Q. Okay. Thank you very much.

17 Now continuing on with the agencies who suggests that
18 there's a relationship between-- or think that the
19 relationship between cigarette smoking-- excuse me, sir-- and
20 disease have been established, we've done WHO, the World
21 Health Organization, the National Institute of Health and now
22 we've done the Surgeon General. And I'd like to suggest to
23 you that perhaps the American Medical Association.

24 A. Yes, sir.

1 Q. All these guys have got initials.

2 The National Cancer Institute?

3 A. Yes, sir.

4 Q. The American Lung Association?

5 A. Yes, sir.

6 Q. The American Cancer Society?

7 A. Yes, sir.

8 Q. The Department of Health, Education and Welfare?

9 A. Yes, sir.

10 Q. The American Nurses Association?

11 A. I'm not familiar with that, sir.

12 Q. Okay. Can you think of any other associations
13 that should be involved on here?

14 A. No, sir.

15 Q. Now, these people all make a profit from selling
16 from cigarettes.

17 A. Yes, sir.

18 Q. And none of these people do, make a profit for
19 selling health.

20 A. That's correct.

21 Q. Actually the AMA, if people stopped smoking and
22 the AMA's right, they'll have less business, won't they, if
23 the AMA's right?

24 A. I'm not-- I don't know, sir.

1 Q. The American Medical Association suggested that if
2 people quit smoking for a certain period of years they won't
3 get cancer from smoking cigarettes, will they?

4 A. Yes, I accept that.

5 Q. All right. And so-- and so if people don't get
6 cancer or heart disease from smoking cigarettes, they'll have
7 fewer patients to treat.

8 A. I guess all of us are going to die from something.

9 Q. Right. But it depends on when, doesn't it?

10 A. Yes.

11 Q. You don't want to die tomorrow, do you?

12 A. No, sir.

13 Q. Speaking about lung cancer, have you ever known
14 anybody who died from lung cancer?

15 A. Yes, sir.

16 Q. It's a particularly agonizing death, isn't it?

17 A. Yes, sir.

18 Q. So we all got to die from something. You wouldn't
19 want to pick that first, would you?

20 A. No, sir.

21 Q. Mr. Chilcote, I think we can all-- Oh, I forgot
22 the Center For Disease Control. They're one too, aren't
23 they?

24 A. Well that's a division of HHS, sir.

1 Q. I think perhaps I ought to question-- I ought to
2 straighten that up with you since you know it.

3 HEW has become or at least portions of it have become
4 Health--

5 A. Health and Human Services.

6 Q. --and Human Services.

7 A. Yes, sir.

8 Q. They-- They-- I'm going to hand you Plaintiff's
9 Exhibits No. 16H, 16J, 16G and 16I, and ask you if you can
10 identify those documents, sir.

11 MR. CRIST: Excuse me, Your Honor, could I move that
12 exhibit a little down because I can't see the witness?

13 MR. COOK: I'm sorry. I'll move it right now.

14 (Mr. Cook moved the chart away from the witness.)

15 THE WITNESS: Did you want me to identify--

16 Q. (Mr. Cook) Yes, I just want you to identify
17 those, if you would, as copies of the Tobacco Observer--

18 A. Yes, sir.

19 Q. --that are published by the--

20 A. These are four Tobacco Observers starting from
21 February 1979 going to March of 1982, which the Tobacco
22 Observer was a publication that used to be put out by the
23 tobacco industry to members of the tobacco family.

24 Q. When-- Have you stopped publishing the Tobacco

1 Observer?

2 A. Yes, sir.

3 Q. When was that?

4 A. From memory I think, Mr. Cook, it was about four
5 years ago.

6 Q. Now some of these documents, I believe 16I and
7 16J, happened before your watch.

8 A. Yes, sir.

9 Q. But 16G and 16H occurred on your shift.

10 A. Yes, sir.

11 Q. Can you tell the jury what the date is, if you can
12 see, on 16G?

13 A. It's December '83, and the other one is March,
14 1982.

15 MR. COOK: Now, I'd move 16H and J into evidence,
16 Your Honor.

17 MR. MacDONALD: Your Honor, we would object in so
18 far as relevance is concerned and hearsay.

19 MR. CRIST: Your Honor, we'd join in the objection.

20 THE COURT: It's tendered under what theory, sir?
21 Let me bring my notes up to speed here.

22 All right, the objection is overruled. G and H are
23 admitted; 16G and H.

24 MR. CRIST: Your Honor, excuse me, I thought he had

1 offered H and J. That's what I heard.

2 MR. COOK: I meant H and G, I'm sorry.

3 MR. CRIST: I'm sorry, it's H and G?

4 MR. COOK: Right. As a matter of fact, it might
5 just be easier if I offered all four, so I don't get them
6 confused. I and J also, but I'm not going to use those now.

7 THE COURT: Do you need any description of these for
8 your notes? J is the August '79. I is February '79.

9 Did you have the same objections to I and J?

10 MR. MacDONALD: Yes, sir, not only as to the fact
11 that all four of those are hearsay and also containing
12 hearsay items. But also on the basis of relevance of not
13 only because there's a wide variety of topics in these
14 things, and I suggest that all the materials may not be
15 relevant to this case.

16 MR. COOK: I suspect and agree with that, and they
17 can be redaculated.

18 THE COURT: All right. We'll take up the relevancy
19 objections as specific parts are sought to be published to
20 the jury. But otherwise the four exhibits, 16G, H, I, and J
21 are admitted.

22 (Plaintiff's Exhibits No. 16G, 16H, 16I and 16J were
23 admitted into evidence at this time.)

24 Q. (Mr. Cook) Now, 16G discusses the fact that and

1 has a statement on it that the Tobacco Institute told the CAB
2 that they should leave the regulation of airline smoking
3 habits to the individual airlines. Is that true?

4 MR. MacDONALD: Your Honor, we have another
5 objection with respect to that subject of CAB, with respect
6 to the Court's prior ruling on another issue.

7 MR. CRIST: Your Honor, we'd join in it.

8 MR. MacDONALD: Should we approach the bench to
9 identify that, sir?

10 THE COURT: Yes. Yes.

11 MR. CRIST: Your Honor, can I also ask, is there
12 someway that we might be able to get copies of these because
13 we're sitting here without the benefit of copies of these
14 things?

15 MR. COOK: Yes.

16 (The following proceedings were had at the bench out
17 of the hearing of the jury.)

18 MR. MacDONALD: Your Honor, when he starts talking
19 about the Civil Aeronautics Board and we get into smoking
20 regulations on airlines, I think the issue becomes one that
21 spills into an area this Court has already precluded from the
22 motions in limine, and that is ETS. I think that this is an
23 area that Mr. Cook had even agreed that he was not going to
24 touch upon. So, I think it's impermissible for him to deal

1 with that subject.

2 MR. CRIST: Your Honor, my objection is based on
3 that, and it's also based upon the fact that we're once
4 getting into lobbying activities of the first amendment.

5 MR. MacDONALD: We would join in as well.

6 MR. GOOLD: And relevance.

7 MR. HEPLER: The relevance and the other objection
8 has been made.

9 THE COURT: What is in there about ETS?

10 MR. COOK: Your Honor, I'm not going to read them
11 anything-- that concludes my presentation on their position
12 with respect to this article. I'm not going to ask them why
13 that's a position or anything like that. The position was
14 if-- that the airlines should regulate smoking.

15 THE COURT: Okay.

16 MR. COOK: That's it.

17 THE COURT: All right. On that representation the
18 specific objection to the motion in limine is overruled.

19 MR. CRIST: To the objections, Your Honor?

20 THE COURT: To what objection? I'm confused. All
21 the objections are overruled.

22 MR. MacDONALD: All right. I would move that it be
23 stricken, Your Honor, then because he's stated that he is
24 going right to the edge on this issue. I think-- You told

1 the Judge what the basis was.

2 Now that we know the basis, it's even more apparent that
3 it was inadmissible, and I would like the Court to strike
4 that.

5 MR. COOK: Why don't you object and let me show you
6 how it's going to be very, very clear? I'll show you in just
7 a minute, and I'll show you the whole thing just shortly.

8 THE COURT: Well, if you want to renew your motion
9 to strike some time at the bench, go right ahead.

10 MR. HEPLER: So you ruled on the motion to strike?

11 MR. MacDONALD: You've denied it at this time?

12 THE COURT: Yes, denied at this time. Thank you.

13 (The following proceedings were had in the presence
14 of the jury.)

15 THE COURT: You may proceed.

16 MR. COOK: Thank you.

17 Q. (Mr. Cook) That basically was in the early '80's,
18 under your watch, the position of the Tobacco Institute in
19 the industry, that the government shouldn't intervene about
20 regulations on smoking and it should be left up to the
21 individual airlines; isn't that true?

22 A. Yes, Horace Kornegay was chairman at that time.

23 Q. And you were president?

24 A. Yes, sir.

1 Q. You're not repudiating that, are you?

2 A. No, sir.

3 Q. What did you do, if you remember, when one of the
4 airlines banned cigarette smoking on the airplane?

5 MR. MacDONALD: Your Honor, same objection on
6 smoking on the airlines that we've previously made.

7 THE COURT: It's overruled.

8 MR. CRIST: We would join in the objection.

9 THE COURT: Noted and overruled.

10 You may proceed, sir.

11 THE WITNESS: I don't know what we did when-- I'm
12 not-- I can't recall if any airline banned smoking. The ban
13 I thought, Mr. Cook, came in after Congress Act.

14 Q. Have you ever heard of Northwest Airlines?

15 A. Yes, sir.

16 Q. I'm going to hand you Plaintiff's Exhibit No. 60
17 and ask you if perhaps that-- First, can you identify that as
18 a publication of the Tobacco Institute?

19 A. Yes, sir, it is a publication.

20 Q. And what is the date of that publication?

21 A. March 25, 1988.

22 Q. And who-- is that a news release by the Tobacco
23 Institute?

24 A. Yes, it is.

1 Q. And who made that news release?

2 A. Brennan Miran.

3 Q. Is Brennan Miran Brennan Dawson?

4 A. Yes, sir. She--

5 Q. Her name has changed?

6 A. That's right, due to marital status.

7 Q. And now in reading that document, does that
8 refresh your recollection that Northwest Airline not only
9 banned cigarette smoking but came out with a big ad campaign?
10 Remember the campaign, "We're the only airline that-- where
11 there isn't any smoking"? Do you remember that?

12 A. I remember that.

13 MR. CRIST: I object to the relevance, materiality
14 and the compound and hearsay nature of the question.

15 MR. COOK: It was just to refresh his recollection,
16 Judge, and he said he did remember it.

17 MR. MacDONALD: Well, Your Honor, the issue-- before
18 we were able to interpose an objection, we would object to
19 that line of questioning on the basis of relevance and
20 materiality to Mr. Kueper in this case.

21 THE COURT: Overruled.

22 Q. (Mr. Cook) In fact, the Tobacco Institute, when
23 Northwest Airlines did that, they attacked Northwest
24 Airlines, did they not?

1 A. I wouldn't say they attacked. They-- we advocated
2 the industry position that we didn't feel that it was
3 necessary, and there were a lot of passengers that were
4 disappointed in Northwest Airlines for taking that course of
5 action.

6 Q. Do you remember that Reynolds-- what Reynolds did,
7 what their action was?

8 A. No, sir, I don't. I know what the Tobacco
9 Institute's reaction was.

10 Q. Did you stop using Northwest Airlines?

11 A. Yes, I personally did, yes, sir.

12 Q. All right. Now--

13 A. If I had another way to fly but--

14 Q. And you told other people that their service was
15 crummy, that they were late and things like that. Is that
16 right?

17 A. I don't-- They-- yes, we did say that they ought
18 to be focusing on some of the real problems associated with
19 the airlines.

20 Q. Rather than smoking?

21 A. Smoking we didn't think was a problem.

22 MR. COOK: Your Honor, I'd like to move the
23 admission of Plaintiff's Exhibit No. 60.

24 MR. MacDONALD: The Tobacco Institute would object,

1 Your Honor, on the basis of, first of all, relevance,
2 materiality, and it goes into matters that have been
3 previously excluded by the Court as being relevant to this
4 case.

5 MR. CRIST: We join in that objection, Your Honor.

6 THE COURT: Overruled.

7 Q. (Mr. Cook) I'd like you to look at Plaintiff's
8 Exhibit No. 60, sir, and I'd like to ask you whether or not
9 this document I have in my hand is a-- I made this this
10 morning myself as you can see. Is that a true and accurate
11 copy of the document in front of you except for the exhibit
12 sticker?

13 A. Yes, it is.

14 Q. Thank you. I'd like to go--

15 MR. COOK: Your Honor, may I display it to the jury?

16 THE COURT: Yes.

17 MR. COOK: I'm sorry.

18 Q. (Mr. Cook) Now going back to Plaintiff's Exhibit
19 No. 16G, you asked the CAB, the Civilian Aeronautics Board,
20 to leave regulation of smoking on airlines up to the
21 airlines, right?

22 A. Yes, sir.

23 Q. All right. And then when one of the airlines
24 regulated it, you not only said that you were disappointed

1 with them with respect to prohibiting smoking and
2 advertising, that they prohibited smoking on the airlines,
3 you attacked them, didn't you?

4 A. I don't know if disagreeing with somebody's
5 position, Mr. Cook, is attacking. I think we have the right
6 to state our position, sir.

7 Q. But you weren't stating your position on smoking.
8 You were stating your position on how many consumer
9 complaints that that airline had in 19-- you said according
10 to DOT records, during 1980 six thousand nine hundred and
11 forty (6,940) consumer complaints were logged against the
12 airline as opposed to only four hundred fifty-seven (457) in
13 1986. I mean consumer complaints on airlines isn't the
14 business of the Tobacco Institute, is it?

15 A. Well, I think that as a consumer of airline
16 service that since this wasn't a real problem in our view,
17 that if they wanted to do something to improve their service
18 they ought to look into the baggage handling, look in a few
19 other things. There are smokers that fly on that airplane.

20 Q. So you wanted everybody to know when you made the
21 news release that Northwest is at the bottom of the worse
22 ranked airlines for delays and cancellations, over-booking,
23 lost/damaged luggage, consumer service, obtaining refunds,
24 and problems making reservations, obtaining tickets or

1 boarding the air craft.

2 A. Mr. Cook, we had other airlines that said they
3 would not like to restrict smoking. We did--

4 Q. So--

5 A. Excuse me, go ahead.

6 Q. No. What I'm trying to-- I mean when somebody
7 wants to restrict smoking like this, you want them to have
8 the power to do it. But if they do it, you would retaliate
9 against them. Is that right?

10 A. Well I think we have a right, sir, to express our
11 opinion. They as a company can do anything they--

12 Q. No, I didn't suggest you didn't have--

13 A. --want to do, sir.

14 Q. Mr. Chilcote, I don't want to suggest to you that
15 I don't think that this isn't the United States and you have
16 a right to say what you want.

17 A. Um-hum.

18 Q. I do. My question is is that it doesn't have to
19 do with whether or not you have the right to curse in public.
20 You do in the United States.

21 MR. MacDONALD: Your Honor, wait, this sounds like a
22 speech or a closing argument on what the law is, and the
23 Judge will instruct them. So, I don't think that that's a
24 proper question even in cross examination.

1 THE COURT: I believe Mr. Cook is trying to clarify
2 the question by using an example. I don't know, I think he
3 was about done with that, at least I hope he was. And he'll
4 get to the point to make the clarification and you can renew
5 your objection if it goes any further.

6 It's overruled at this time.

7 Q. (Mr. Cook) The point is that you have a right to
8 retaliate. I understand that. The point is is that you will
9 retaliate and you do if people, agencies, the American Cancer
10 Society, you have a right to retaliate and criticize them. I
11 understand that. And you do, don't you?

12 A. We do not-- I object to the term "retaliate". We
13 do state our position. If we disagree, we do this. I think
14 that this is accurate, "Northwest Airline disappoints the
15 passengers once again". I think there's some disappointed
16 people.

17 Q. Right. Do you think people are disappointed in
18 the American Cancer Society?

19 A. I don't know.

20 Q. Are you personally critical of the American Cancer
21 Society?

22 A. Mr. Cook, I applaud the American Cancer Society.
23 I wish that maybe more money would go into-- you know, I
24 don't know.

1 Q. You wouldn't say that the American Cancer Society
2 has trumped up its concern about smoking and its
3 publications? Do you think so?

4 MR. MacDONALD: Your Honor, I would object as to
5 foundation. He hasn't established what he means by "trumped
6 up" or any other position.

7 THE COURT: Overruled.

8 MR. COOK: But I'll do this for Mr. MacDonald.

9 MR. MacDONALD: Thank you.

10 Q. (Mr. Cook) What does trumped up mean to you?
11 I've got my dictionary. It means fabricated, doesn't it?

12 A. Yes, I think it does, yes, sir.

13 Q. And if you said something like that statistics
14 were invented, that would mean fabricated, wouldn't it?

15 A. Yes, sir.

16 Q. And the Tobacco Institute has roundly criticized
17 anybody who suggests the Surgeon General, Joe Califano, who
18 suggests that there is this number of deaths that are
19 associated with cancer smoking, this three hundred thousand
20 plus figure; isn't that true?

21 A. Mr. Cook, the industry has recognized that there
22 is some statistical correlation, that people are at risk,
23 sir.

24 Q. Then why do you accuse the people who say what the

1 figures are that they're made up?

2 A. I--

3 Q. You don't?

4 A. I don't think we've said that you know-- just what
5 I said, that there is a statistical correlation, that you are
6 at increased risks for certain diseases.

7 Q. Well let me ask you this, you don't think it would
8 be appropriate in this health dispute to suggest that these
9 voluntary health agencies or the government is making these
10 figures up. You don't think that is either right or
11 appropriate, do you?

12 A. Sir, we've not-- well, repeat the question.

13 Q. Yeah. I know that you think that you don't do
14 that, Mr. Chilcote. My question is, is not do you think that
15 you don't do it, I'm asking you to agree with me. Anybody
16 involved in this dispute who would say that the Surgeon
17 General is making the figures up about the numbers of deaths
18 that he correlates with smoking, that isn't something you
19 would approve of, is it?

20 A. Mr. Cook, we have said that there is a statistical
21 correlation and there are certain risks--

22 Q. Do you have a problem with my question, sir?

23 A. I thought I was being-- I think I'm trying to be
24 responsive to you, sir.

1 Q. Okay. My question is, is if somebody said that,
2 that these figures were invented, that they were fabricated,
3 that they were made up, that they were trumped up and
4 published that, you wouldn't agree with that type of
5 activity?

6 A. I may not use the language that you're talking
7 about. But I would preserve my right, sir, to disagree.

8 Q. I understand. So, does that mean that you think
9 that these figures that I read you yesterday from-- or I had
10 you read yesterday in the Surgeon General's Report from 1979,
11 do you think that those are invented or trumped up?

12 A. Sir, I don't know. I'm not--

13 Q. Well if you don't know, you wouldn't suggest-- I
14 mean it isn't fair to say-- to say that these things are made
15 up if you don't know, is it?

16 A. Well, if we respond to a study, it is based upon
17 information that we have been provided with people who look
18 into the methodology of other things--

19 Q. Sir, why can't you answer my question?

20 MR. MacDONALD: Your Honor, I object to--

21 MR. CRIST: I object to that.

22 MR. MacDONALD: --that. That was responsive to the
23 question.

24 MR. COOK: I didn't ask if they respond to it.

1 MR. MacDONALD: He told you what it was.

2 THE COURT: The objections are overruled.

3 Please, once again, listen to the question.

4 THE WITNESS: I'm trying to, sir.

5 THE COURT: And not--

6 Q. (Mr. Cook) Sir, this is--

7 THE COURT: Excuse me, Mr. Cook, I was addressing
8 the witness.

9 MR. COOK: I'm sorry. I thought you were finished,
10 Judge.

11 THE COURT: I thought there was a further objection.

12 Listen to the question because I'm sure the way Mr. Cook
13 is phrasing them may not occur to you if you're thinking of
14 your answer. So, let's proceed.

15 MR. COOK: I apologize, Judge. I thought you were
16 finished.

17 Q. (Mr. Cook) Mr. Chilcote, so that you understand
18 with respect to your answers, sometimes I ask you about what
19 the Tobacco Institute does. Sometimes then I ask you what
20 you think or what you do personally, for example, talking
21 about the figures of whether or not three hundred thousand
22 people or more die a year from cigarette smoking.

23 Now, you don't know whether that's true or not, do you?

24 A. No, sir. I know that the reports I've seen it's

1 been five million to ten million people die from-- of
2 cigarette cancer. But I hear different types of reports,
3 sir.

4 Q. Right. But the point is that all of these people
5 who don't really have any particular reason to be untruthful
6 or any concern about whether or not cigarette smoking is--
7 whether cigarettes are sold or not, these voluntary health
8 organizations, you don't have any reason to believe that
9 they're lying, do you?

10 A. Mr. Cook, I personally believe that in some cases
11 these groups exaggerate the fact.

12 Q. Okay. So you do have reason, from time to time,
13 that they're lying?

14 A. I have no basis-- I'm not a statistician. I'm not
15 a doctor, but my own view is that.

16 Q. That they're lying?

17 A. That the industry position-- I'm sure they
18 believe, sir, in their position. I just don't happen to
19 agree with it.

20 Q. Right. And that's based on what other people have
21 told you, not on your own personal knowledge. You're not a
22 doctor. You're not a professional or anything like that.

23 A. Yes, sir.

24 Q. So you think and approve of if a person went out

1 and said that the Surgeon General's figures on the
2 statistics, the number of deaths associated with cancer
3 smoking, are fabricated, you don't have any objection to
4 that, do you?

5 A. I've heard a lot of different figures relative to
6 what the Surgeon General and a lot of people that disagree
7 with the figures that the Surgeon Generals use, sir.

8 Q. What's a canard?

9 A. I don't know, sir.

10 Q. I'm going to hand you Plaintiff's Exhibit No. 41
11 and ask you if you'll look at that document.

12 A. Do you want me to read the whole document, sir?

13 Q. No, I don't want you to read the document. I want
14 you to look-- can you identify that as one of the handouts,
15 one of the publications made by the Tobacco Institute that
16 were sent out to the public in the United States?

17 A. This is a Tobacco Institute document which was
18 back in '74, sir. That's all I know about it. I've not seen
19 the document before.

20 Q. Do you know how many millions of those were sent
21 out to the public?

22 A. I have no idea, sir. It was before my time.

23 Q. You have not seen that document?

24 A. No, sir, I have not.

1 Q. You have all kinds of documents like that on the
2 cigarette controversy, don't you, that you've published and
3 sent out nationwide in the United States, have you not?

4 MR. MacDONALD: Your Honor, I object to the form of
5 the question. He hasn't let him read the document to know
6 what it contains and find out whether or not there's others
7 like it. I object to the form.

8 MR. COOK: It's cross examination.

9 MR. MacDONALD: It doesn't matter, Your Honor. It's
10 still foundation, Your Honor.

11 THE COURT: Well, I think the witness can respond to
12 the question and clarify-- the objection is overruled. He
13 can respond whether he knows or not.

14 THE WITNESS: Mr. Cook, I have not read documents--
15 I haven't gone through the library to read these documents,
16 sir.

17 Q. (Mr. Cook) You know that you hand documents out,
18 don't you?

19 A. We do have publications that when requested we do
20 have them. But I can't recall all of them, yes, sir.

21 Q. Can you recall any of them for goodness sakes?

22 A. Yes, I can recall some, like our Helping Youth
23 Decide Program or It's the Law Program, contributions that
24 the industry makes to the economy.

1 Q. Any other ones of Tobacco and Health, sir? I'm
2 sorry, most of my concerns will be when I ask you things
3 about tobacco and health.

4 A. We-- we really are-- I haven't been that involved
5 in the tobacco and health issues.

6 Q. Would you look at Page 5 of that document, sir?

7 MR. COOK: I move the admission of that document.

8 MR. CRIST: Your Honor, I'd like to preserve my
9 objection because I haven't had a chance to read it. I don't
10 have a copy before me.

11 MR. MacDONALD: Your Honor, could we approach the
12 bench just briefly for a procedure question?

13 THE COURT: Yes.

14 (The following proceedings were had at the bench out
15 of the hearing of the jury.)

16 MR. COOK: Can I say something first? Why don't you
17 guys go out in that little room and look at what I've asked
18 you to bring to me? That's one document that you brought to
19 me. For goodness sakes look at it.

20 MR. MacDONALD: Now that he's done, if this Court
21 recognizes how many thousands of documents have been produced
22 by every party to this litigation, if Mr. Cook is going to
23 use some of those, I think he should extend us the courtesy
24 of making copies for us and at least letting us look at them.

1 We don't want to slow this down anymore than possible, but
2 one of the things that is unfair is that he will show it to
3 us for a second and then go up to the witness and then try to
4 move for admission of a document we haven't ever read.

5 Now, the point is that I don't care if he doesn't want to
6 show it to us ahead of time before using it for some trial
7 strategy, but I think he should do us the courtesy of making
8 us a copy of it and letting us have it.

9 THE COURT: I need to look at it a minute.

10 MR. COOK: This comes out of these original
11 documents. I asked him to bring the original of the
12 document. That comes out of it. Now, I don't think it's
13 asking too much to read you these originals that I asked you
14 to bring to this trial.

15 MR. CRIST: Your Honor, I've got the same objection.
16 They weren't produced or they were produced to Mr. Cook
17 pursuant to 237. I don't know--

18 MR. COOK: They're sitting out there, look at them.

19 THE COURT: So, you're objecting to provide
20 simultaneous copies?

21 MR. COOK: I don't even have a copy for myself. I'm
22 using it for his examination this morning. That is not one
23 of my listed exhibits.

24 THE COURT: As a--

1 MR. MacDONALD: He's done it for some. I don't know
2 why he won't do it for--

3 THE COURT: For the moment, can we agree that if
4 you've got something give it to them?

5 MR. COOK: I'll give it to them. If I had it right
6 here, I'll give it to them. I don't care.

7 Judge, I don't have anything to hide from these people--

8 THE COURT: Do you want this?

9 MR. CRIST: Yes, I'd like to read it, Your Honor.

10 MR. COOK: Your Honor, you have got about ten of
11 those things, go look at them.

12 MR. MacDONALD: That still doesn't help. We may
13 have a public library, but the point is if he's going to use--

14 MR. COOK: These are your handouts.

15 MR. MacDONALD: I know that, Bruce.

16 (The following proceedings were had in the presence
17 of the jury.)

18 THE COURT: Ladies and gentlemen, we're going to
19 take a brief recess. It's five after ten. Let's reconvene
20 at 10:15. You're free to leave the courtroom if you want.
21 Just the same admonitions are in place, don't talk to anybody
22 about the case or amongst yourself.

23 (At this time, a recess was taken.)
24

1 (The following proceedings were had out of the
2 hearing and presence of the jury.)

3 MR. COOK: Your Honor, the Tobacco Institute has
4 published maybe ten or fifteen handouts that they send out to
5 the general public concerning the issue of smoking and
6 health, and I have requested them and they have produced them
7 to me. It defies my imagination that these gentlemen are not
8 familiar with these documents. Now-- and these documents, by
9 the way, I also originally got them from R.J.R.

10 So, I don't quite understand how you can scream surprise
11 on the document. But the question about the document is is
12 that I mean there isn't any question that that document's
13 admissible or not. I mean-- and for you to say, "Well, I
14 haven't read it", it's a handout that you made on smoking and
15 health. That's the issue involved here.

16 MR. MacDONALD: Now, let me just-- If the point is
17 escaping you, Mr. Cook, let me clarify it. The point is not
18 that we're not contending it's not a document. Thousands of
19 documents have been produced to Mr. Cook purely for purposes
20 of expediting this matter.

21 All we're asking him is that if he's going to introduce
22 a document or he's going to take it up and show it to the
23 witness-- we don't want to slow this down by making sure the
24 document he has and looking at every page-- to give us the

1 courtesy of providing a copy as he has done with some of the
2 others and indicate that he would do. That's all we're
3 asking him to do.

4 MR. COOK: When I'm able to do it I will.

5 MR. CRIST: Your Honor, we understand that. I think
6 there's much to do about nothing. My problem was that the
7 document was offered and we produced it--

8 THE COURT: You already have a copy?

9 MR. CRIST: No, this is his copy. This is the
10 exhibit copy.

11 A half a million pages of documents, I can't remember
12 what's in every one. I can't remember whether or not there's
13 an evidentiary basis for an objection.

14 Now having looked at this, there are some and I have
15 objections that I want to make with respect to this, not with
16 respect to its authenticity. That's not the basis of it.
17 But in fact there is a portion of this document which
18 violates one of the Court's orders in limine.

19 That's all I want, Bruce.

20 MR. COOK: Until I use the document--

21 MR. CRIST: You've offered it.

22 MR. COOK: Right, I've offered the document. That
23 doesn't mean the jury gets to see it. Now as a practical
24 matter, the portion that I was going to read to Mr. Chilcote,

1 just so the Court understands what the purpose of this
2 document is, is on Page 5. It says, "Deceptive propaganda.
3 Canard, definition, a false or absurd story or rumor, a
4 hoax." And then it says, "From Funk & Wagnell, Standard
5 Encyclopedia Dictionary." And it says, "Have you heard
6 these canards? Three hundred thousand people die each year
7 because they smoke."

8 Now, that's the topic that I'm on while we're doing this,
9 and when he says he doesn't know what a canard is, I was
10 going to show him what one was. And I can't imagine that you
11 people are not prepared sufficiently enough that you know
12 that you published that.

13 The next thing I'm going to show you is inventive, and
14 you guys know what inventive says. You know, I mean do I
15 have to tell you in advance that I'm going to use invented?
16 I thought you guys would have known that.

17 MR. CRIST: All we need is the courtesy, Bruce, of
18 having copies made available to us or an opportunity to
19 review a document--

20 THE COURT: I think we all agree--

21 MR. COOK: I don't know what necessarily what
22 documents I'm going to use. It depends on what your witness
23 says. If I have copies--

24 MR. CRIST: Well then give us an opportunity to look

1 at it, give us an opportunity to look at it so we can frame
2 the objections.

3 THE COURT: All right. All right. I think it's
4 appropriate that I guarantee prior to asking for an admission
5 of the document that the defense counsel have an opportunity
6 to review the document to make any appropriate objections.
7 That does not mean that he cannot show the witness the
8 document prior to you seeing it. It can be simultaneous.

9 MR. MacDONALD: He moved it for admission.

10 THE COURT: I know, and I'm agreeing with you, that
11 you should have an opportunity to review it before you get--
12 you get, you know, blind-sided by the document.

13 MR. COOK: Here's some more. Please, take them home
14 with you and study them.

15 THE COURT: All right. I think we're having a break
16 mode here, so let's get some coffee or something.

17 MR. CRIST: Do you want us to state our objections
18 before we break?

19 THE COURT: Well, he's indicated he's just going to
20 go into the canard issue. I deem that admissible.

21 There's a gentlemen walking in here.

22 (At this time, a juror was present in the
23 courtroom.)

24 MR. CRIST: Are you going to break just for a few

1 minutes?

2 THE COURT: Yeah, we're going to break.

3 MR. COOK: May I suggest--

4 (At this time, the juror exited the courtroom.)

5 MR. COOK: --to the Reynolds people that you go out
6 there and look at what T.I. brought me and to the T.I.
7 people--

8 See, Judge, I have designated them to bring these
9 documents out of all of the material, all of the times of
10 absolute dither that they have given me, these documents I
11 have requested them under Rule 237 to bring to this trial.

12 Now, there is a reason why I requested them and that's--

13 THE COURT: How many documents are there out there
14 in that category?

15 MR. COOK: In Mr. MacDonald's bunch is that there
16 are four small boxes like this.

17 THE COURT: You mean like a shoe box or what?

18 MR. COOK: No, they're like boxes about the size of--

19 THE COURT: --stationary boxes?

20 MR. COOK: Like a stationary box, about that high.
21 And most of them are big objects.

22 THE COURT: Well, I can see both sides of this. You
23 dump it on them and they're surprised. They sit there with
24 this startled look on their face like he's coming from left

1 field again, and you're communicating both of those things to
2 the jury. So, I think you can-- if that's your motive, you
3 both are winning on your points. Let's just try to keep it
4 as gentlemanly as possible. You show copies to the extent
5 you have them, and if you want that reaction communicated to
6 the jury, fine. If you want to know what's going on, look in
7 your box.

8 MR. CRIST: Your Honor, what time will you plan on--

9 THE COURT: I guess another ten minutes or so.

10 MR. CRIST: Okay. Thank you.

11 (Recess taken.)

12 * * * * *

13 (The following proceedings were reported by

14 Donna Brewer, Illinois CSR 084-002549, RPR.)

15 (The cross examination of Dr. Samuel D. Chilcote,
16 Jr., under Section 2-1102 of the Civil Practice Act
17 by Mr. Cook continued as follows.)

18 THE COURT: You may proceed, Mr. Cook.

19 MR. COOK: Thank you.

20 Q. (By Mr. Cook) I would like you to look --

21 MR. CRIST: Your Honor, I believe that you asked us
22 to state on the record the objections which we had --

23 THE COURT: The objection is overruled. I think Mr.
24 Cook has indicated the limited use of the document.

1 Q. (By Mr. Cook) Looking at Plaintiff's Exhibit No.
2 41, page 5, that has a definition of the term canard, does it
3 not?

4 A. Yes, sir.

5 Q. And would you tell the jury what the term canard
6 means according to the Tobacco Institute's dictionary?

7 A. The definition is, "Noun. A false or absurd story
8 or rumor; a hoax." Funk & Wagnalls Standard Encyclopedic
9 Dictionary.

10 Q. And can you tell the jury what you are looking at,
11 Plaintiff's Exhibit No. -- is it 60?

12 A. 41.

13 Q. 41, I'm sorry. Exhibit No. 41, what year that was
14 published by the Tobacco Institute?

15 A. 1974.

16 Q. And the hoax the Tobacco Institute was referring to
17 was the hoax of more than 300,000 deaths a year from smoking,
18 is that right?

19 MR. MACDONALD: Your Honor, I object. I think the
20 document speaks for itself. If he is asking him to refer to
21 it, he should just read it.

22 MR. COOK: I think that this is cross examination.

23 THE COURT: It's overruled.

24 THE WITNESS: I'm sorry. What was the question?

1 Q. (By Mr. Cook) The hoax the Tobacco Institute is
2 talking about is the hoax where people are saying more than
3 300,000 deaths a year are caused by smoking cigarettes.

4 A. Yes, sir.

5 Q. All right. So -- so what we have on one hand is we
6 have the Surgeon General saying that 300,000 people a year
7 are dying from smoking and we have the Tobacco Institute on
8 the other hand saying that this is untrue. It's absurd.
9 It's false. That's what you say, isn't it?

10 A. That's correct.

11 Q. All right. Now, what should the public believe?
12 Should they believe that people are dying or should they
13 believe that the dreaded American Cancer Society is
14 perpetrating a hoax on them?

15 MR. CRIST: Your Honor, I object. It's the
16 preemption issue again.

17 THE COURT: It's overruled for the reasons
18 previously stated.

19 MR. MACDONALD: Same objection.

20 MR. NESTER: I join, your Honor.

21 THE COURT: Noted and overruled.

22 THE WITNESS: Mr. Cook, when the -- it has been my
23 experience when the industry has taken exception to a figure
24 that has been advanced that they look into it with people who

1 are trained in that area, statisticians, medical community,
2 consultants that they may have. And I feel that the industry
3 gives a responsible response; one, if they disagree with the
4 figures, I think they have a right to say that they disagree,
5 sir.

6 Q. I didn't ask you whether they had a right to say it.
7 I mean we have been through that before. You can say a lot
8 of things in this country. You can do a lot of things. And
9 we cherish our individual liberties. I understand that. But
10 also one of our rights is that I get to ask you questions and
11 you must answer them.

12 MR. MACDONALD: Your Honor, I object --

13 MR. COOK: And so --

14 MR. MACDONALD: I object to that question and him
15 trying to instruct the witness as to what he needs to do or
16 not do. I think that's inappropriate and I object to that.

17 MR. CRIST: Same objection.

18 THE COURT: Mr. Cook, I think you were attempting to
19 clarify your question. If you want to instruct the witness,
20 please ask me to do so and I will.

21 MR. COOK: I'll do that, your Honor.

22 Q. (By Mr. Cook) Do you recall by any chance what I
23 asked you, the question?

24 A. Would you repeat the question?

1 Q. Listen to my question. I didn't ask you about the
2 industry or anything like that. I asked you about people,
3 human beings who are out there, children who are out there
4 making decisions about whether or not they should smoke or
5 not. Should they believe the American Cancer Society that
6 it's dangerous and 1,000 people a day die from it or should
7 they believe the Tobacco Institute who says that's a hoax?
8 Who should they believe?

9 MR. CRIST: Same objection, your Honor. I also
10 object on the basis it calls for speculation.

11 THE COURT: It's overruled.

12 MR. MACDONALD: Same objection.

13 MR. NESTER: I join.

14 THE COURT: Overruled.

15 THE WITNESS: Mr. Cook, I am not going to say who
16 someone should believe or not. I think they have to evaluate
17 the information that is out there and make the decision
18 themselves.

19 Q. (By Mr. Cook) But --

20 A. Is that specific enough for you, sir?

21 Q. No. But I'll get to it in a minute.

22 MR. COOK: Your Honor, I would like to display page
23 5 of 41 to the jury.

24 MR. CRIST: Has that already been admitted?

1 MR. COOK: That's the exhibit that is right in front
2 of him right now.

3 MR. CRIST: I didn't know if you moved for admission
4 accordingly.

5 THE COURT: Let me see page 5 before we go any
6 further.

7 MR. COOK: Do you want the big one or the little
8 one, Judge?

9 THE COURT: This will work. You may display this to
10 the jury. So far as it necessitates admitting something into
11 evidence, then that page, page 5 is admitted. We'll take up
12 any other --

13 Q. (By Mr. Cook) Now, I am showing the
14 publication -- now, you don't know how many of those you have
15 handed out?

16 A. No, sir. I have no idea.

17 Q. Would you be surprised if it was more than a
18 million?

19 A. I have no idea how many have been handed out.

20 Q. Do you have a big postage bill at the Tobacco
21 Institute?

22 A. We do have a postage bill. I can't recall the size.

23 Q. Now -- oh, I wrote through canard. "Deceptive
24 Propaganda. Have you heard these canards? 300,000 people

1 die each year because they smoked." Now, there is only one
2 reason why you would tell people that this is a hoax, isn't
3 there? You don't want them to believe it.

4 A. I would say that they were taken issue, sir.

5 Q. No. The reason why you would tell -- just assume
6 for a minute that you mailed a million of these out. Just
7 assume that.

8 A. I don't know how many we mailed out.

9 Q. Just assume it and then I'll prove it. There is
10 only one reason to tell the public that the figures are a
11 hoax, isn't it? And that's because you don't want the public
12 to believe them.

13 A. Mr. Cook, that may not be the language that I would
14 use. This is a very controversial subject. There is strong
15 feelings on both sides, sir.

16 Q. Sir, strong feelings on both sides? One side thinks
17 that a lot of people are being killed and the other side is
18 making a profit. And I imagine -- is that the reason for the
19 strong feelings?

20 A. No. I think that people disagree.

21 Q. My question was, sir, when you go around -- when the
22 Tobacco Institute went around and told people -- when you
23 tell them something is a hoax, you are telling them not to
24 believe it, aren't you?

1 A. Sir, I didn't tell them that it was a hoax.

2 Q. The Tobacco Institute told them. You are the
3 President of the Tobacco Institute.

4 A. I think that, as I said before, that there is two
5 sides to this question.

6 Q. But -- you have said that a lot. But I
7 didn't -- let me ask you this so you can make it real clear
8 to the jury. How many sides are there to this question?

9 A. I don't know all the sides.

10 Q. Oh, I thought you just said there were two.

11 A. Well, there is the industry's position and the --

12 Q. Okay. Now, we have got that out of the way.

13 A. I'm sure that other people have their --

14 Q. Now, we have that out of the way how many sides
15 there are. And we understand what the motives are, too,
16 don't we, of the two sides?

17 A. I think -- yes, to advocate their beliefs.

18 Q. Right. And the motives of the National Institute of
19 Health and the American Medical Association and the National
20 Cancer Institute and the American Lung Association and the
21 American Cancer Society, their motivations are for public
22 health, aren't they?

23 MR. MACDONALD: Your Honor, I object to the
24 question. It calls for him to speculate as to what any of

1 these organizations may do or the reason they may say
2 something.

3 THE COURT: Overruled.

4 THE WITNESS: Mr. Cook, I don't know what their
5 missions are.

6 Q. (By Mr. Cook) Is there any reason to them that you
7 attribute false or impure or improper motives to the American
8 Cancer Society?

9 A. No, I do not.

10 Q. Or to the American Medical Association? You don't
11 do that, do you? You think that these people genuinely
12 believe that they are trying to save lives, don't you?

13 A. Yes.

14 Q. All right. And you think that the -- that the
15 Tobacco Institute and R.J. Reynolds, Phillip Morris, Liggett
16 & Myer and Lorillard think that these people have perpetrated
17 a hoax on the American public, don't you?

18 A. I think that those -- that the industry has
19 evaluated the information, the reports that these various
20 groups adopt and they have a different view, sir.

21 Q. Well, sir, now to say that you have a different view
22 is one thing. To say that the people who oppose you have
23 fabricated something, published false statements, that's
24 quite another, isn't it?

1 A. Sir, as I said earlier, people have different ways
2 of expressing themselves. That may not be something -- the
3 way that I would put --

4 Q. Right.

5 A. You understand that?

6 Q. I understand what you said. I also understood my
7 question. My question was that if you accuse somebody of a
8 hoax, if you accuse somebody of making a false statement,
9 that isn't the same as saying you disagree with them, is it?

10 A. Well, I don't -- I don't know -- I guess it's -- I
11 would say I don't think that's true or, you know, I think
12 that's false. I think it's a hoax. I mean, how did you
13 fabricate that? It's --

14 Q. But that's the point. You went out and told the
15 American -- these people all said, "Hey, there is a heck of a
16 problem. Hundreds of thousands of people are dying every
17 year." And then you went out and publicly made a statement
18 saying, "This isn't true what they are saying. It's
19 fabricated. It's a hoax." And there is only one reason why
20 the Tobacco Institute would want to do that, isn't there,
21 sir? And it's because they don't want people to stop smoking
22 cigarettes. They don't want people to believe that smoking
23 cigarettes causes death. That's the only reason, isn't it?

24 A. No, sir.

1 Q. It's the same as vending machines. The Surgeon
2 General in -- throughout the years says that more than 3,000
3 kids, teenagers, start smoking a year. Are you aware of that
4 fact that the Surgeon General says that?

5 MR. CRIST: Your Honor, I object. This has been
6 asked and answered time and again.

7 MR. MACDONALD: We also renew our objections on the
8 relevance of vending machines, your Honor.

9 THE COURT: All right. I believe that was covered
10 yesterday, Mr. Cook. You can -- it was the same question.
11 So your objection is sustained.

12 Q. (By Mr. Cook) People are starting to get the
13 message, aren't they?

14 A. What message is --

15 MR. CRIST: Your Honor, I object. The preemption
16 point once again.

17 THE COURT: It's overruled.

18 MR. MACDONALD: Join, your Honor.

19 MR. NESTER: Join, your Honor.

20 THE COURT: Objection is --

21 Q. (By Mr. Cook) The message is that cigarette
22 smoking --

23 THE COURT: -- overruled.

24 Q. (By Mr. Cook) -- causes cancer. People are

1 beginning to get it from the American Cancer Society, from
2 the Surgeon Generals, from the National Institute of Health.
3 They are starting to get that message, aren't they?

4 A. Ninety-eight --

5 MR. CRIST: Same objection, your Honor.

6 THE WITNESS: My information is --

7 THE COURT: Overruled. Gentlemen, please, when
8 there is an objection, let us rule on it -- let me rule on
9 it, dispatch it. I don't want to interrupt your questioning.
10 It seems that it's happening. But let's just go. Go ahead
11 with your question. Do you want to rephrase it for the
12 witness?

13 MR. COOK: Yes.

14 Q. (By Mr. Cook) People are stopping -- don't smoke in
15 the same amount that they used to, do they?

16 A. No. Smoking is on the decline, sir.

17 Q. You are from the Tobacco Institute. Why do you
18 think smoking is on the decline?

19 A. Ninety-eight, as I said to you earlier -- 98 percent
20 of the people believe that smoking is harmful to them. So
21 they are making their own personal decisions.

22 Q. And so people are -- if you believe the Surgeon
23 General, of course, is that 1,000 of your best customers die
24 every day. Is that true?

1 MR. CRIST: Your Honor, I object. It has been asked
2 and answered and asked and answered.

3 THE COURT: It does seem to be the same question,
4 Mr. Cook.

5 MR. COOK: It was just preparatory to another
6 question.

7 Q. (By Mr. Cook) How do you replace these smokers who
8 quit or die? Some of them just, I assume, die because they
9 are run over by cars, you know. In order for your -- if
10 everyone just quit smoking, your business would be done,
11 right?

12 A. Mr. Cook, as I said, I am not in marketing. I don't
13 know what causes people to smoke or not to smoke. I think
14 it's --

15 Q. If everybody quit, your business would be done.
16 That was my question.

17 A. Yes, sir.

18 MR. CRIST: Your Honor, I object. He asked the
19 witness a question and responded to it and said it was a
20 different question. He is badgering the witness.

21 THE COURT: Overruled.

22 Q. (By Mr. Cook) Let's get back to 15A. I think one
23 of the -- does the Court have 15A? Let's get back to 15A and
24 talk about the organization of the Tobacco Institute. I

1 believe that we were on the third page.

2 THE COURT: Is the light sufficient now?

3 (Jurors indicate yes.)

4 Q. (By Mr. Cook) And all of this conversation that you
5 and I have gone through has to do about you said, "I don't
6 know what they are talking about when they say the use of
7 tobacco." The fourth duty of the Tobacco Institute as
8 expressed by President Kornegay was, "To collect and
9 disseminate scientific and medical material relating to
10 tobacco." You do that?

11 A. If there is any reports out from government agencies
12 or anyone independent in tobacco, we do that. We do not do
13 any scientific or medical research, sir.

14 Q. Okay. "To collect and disseminate information
15 relating to the tobacco industry published or released by any
16 governmental agency, federal or state, or derived from
17 sources independent of the industry."

18 A. Yes, sir.

19 Q. Six, "To collect and disseminate information
20 relating to legislative and administrative developments,
21 federal or state, affecting the tobacco industry." And, the
22 seventh one is, "To promote public good will." And then the
23 next thing says that you don't do any advertising.

24 Mr. Kornegay says in the bottom paragraph of that

1 exhibit that, "In 1958, the Institute started its operation
2 with four people. Today it has a staff of 32, which includes
3 secretaries and support personnel." You have considerably
4 more than that at this time, is that true?

5 A. Our employees to date are 77.

6 Q. All right. The next page on 4 said, "There are 12
7 positions which could be classified as executive in nature.
8 Among the 12 are senior vice presidents for government
9 relations, communications, state activities and
10 administration. We also have the positions of director of
11 statistics and medical director." As I understand it, you no
12 longer have a medical director or a director of statistics.

13 A. That's right, sir.

14 Q. When were those positions abolished?

15 A. In the early 80's.

16 Q. And then Mr. Kornegay said, "The director of
17 statistics is an extremely important position, because so
18 much of the cigarette smoking controversy is based upon the
19 use -- and I should also say the misuse -- of statistics." I
20 guess you agree with that, too?

21 A. Yes, sir.

22 Q. You personally feel that the risks of smoking to a
23 human's health are exaggerated, do you not?

24 A. I don't know, sir. I know that it's an increased

1 risk. I don't know what the odds are. I haven't --

2 Q. You think the odds are good for a smoker?

3 A. Five to ten percent of the people who use the
4 product have been associated with lung cancer.

5 Q. Where did you get that figure from?

6 A. Some figure that -- I can't recall the exact source,
7 sir.

8 Q. Would you tell me that again? Five or ten percent
9 of the people who use your product --

10 A. It has been estimated five to ten percent of the
11 people, that smoking has been associated with lung cancer.

12 Q. How many have heart disease?

13 MR. CRIST: Your Honor, I object --

14 THE COURT: It's overruled.

15 MR. CRIST: -- materiality.

16 MR. MACDONALD: Same objection, your Honor.
17 Relevance and materiality.

18 THE COURT: It's overruled.

19 MR. MACDONALD: Court's prior order as well.

20 THE COURT: There was no such prior order, by the
21 way. You may proceed.

22 Q. (By Mr. Cook) Now, how many executive positions are
23 there now?

24 A. I have four senior vice presidents and they have

1 professional staff members under them. I couldn't recall,
2 sir, the exact balance, numbers of professional versus non-
3 professional.

4 Q. How many vice presidents do you have?

5 A. I'm really not sure. They had when I joined the
6 organization quite a few vice presidents and I have been
7 trying to cut back on that. I didn't want to take the title
8 away from a person who had had that. Titles mean a lot to
9 people.

10 Q. We can get back to that. I believe I have got a
11 sheet that would show that somewhere. Are there more than
12 12?

13 A. Yes, sir.

14 Q. The next paragraph says, "Some of us wear more than
15 one hat. For example, I have the final responsibility for
16 administration and personnel." That was Mr. Kornegay in
17 1975. Is that you now?

18 A. Yes, sir.

19 Q. Okay. "But when we have a legislative problem with
20 the Congress or other matters involving the federal agencies,
21 I pitch in and assist Jack Mills, who is senior vice
22 president for governmental affairs." That would be at least
23 on the federal level Vice President Lewis at this time, is
24 that true?

1 MR. CRIST: Your Honor, I object, lobbying.

2 THE COURT: Overruled.

3 THE WITNESS: The present head of our Federal
4 Relations Division is Bob Lewis.

5 Q. (By Mr. Cook) "In addition, I take on the
6 responsibility of representing the Institute in dealing with
7 other industries and outside groups and serving as the
8 spokesman at meetings and conventions." We'll go on to the
9 next page. Oh, on your staff is that -- there is a point
10 made on the bottom of that is that your staff is comprised of
11 both Democrats and Republicans, liberals and conservatives.
12 Is that true? That's still true, isn't it?

13 A. Yes, sir.

14 Q. The tobacco industry is -- or the tobacco question
15 is one that politically is interesting, isn't it? Because
16 traditional alliances don't necessarily exist, isn't that
17 true?

18 A. That's true.

19 Q. For example, Teddy Kennedy and Orrin Hatch are on
20 the same side on the tobacco issues frequently.

21 A. Yes, sir, they are.

22 Q. One of them is an arch conservative; the other is
23 liberal.

24 A. The other is liberal and from Utah (inaudible.)

1 COURT REPORTER: Excuse me?

2 THE WITNESS: And from the State of Utah and his
3 religion is Mormon.

4 Q. (By Mr. Cook) The next paragraph talks about your
5 politics and it says your politics is -- you have only one
6 philosophy and that's tobacco. It talks about, "At the
7 outset, many of the functions of the Institute were carried
8 out by outside counsel, outside law firms and outside PR
9 firms like Hill & Knowlton and then that went inside.

10 A. Yes, sir.

11 Q. And when it went inside it came under a vice
12 president called Kloefer, is that true? Kloefer.

13 A. Yes. Not -- they did still retain public relations
14 counsel, but not as -- not on a day to day basis.

15 Q. Do you have them now?

16 A. Yes, we do have some public relations agencies, for
17 example, working on our youth program and "It's the Law."

18 Q. Did they ever suggest to you that in your youth
19 program that you should put something in there about there is
20 a health risk associated with cigarette smoking?

21 MR. CRIST: Objection, your Honor, preemption.

22 MR. MACDONALD: Objection, hearsay.

23 THE WITNESS: That --

24 THE COURT: Excuse me. There is an objection

1 pending.

2 MR. CRIST: Both hearsay and preemption, your Honor.

3 THE COURT: The objection is overruled. You may
4 proceed.

5 THE WITNESS: That brochure, sir, was written by
6 educators. And they helped in the laying out the material,
7 the --

8 Q. (By Mr. Cook) Do you recall my question? I really
9 don't want to interrupt you. I asked you whether the PR
10 people suggested to you that you put a statement in there --

11 A. No, sir.

12 Q. They didn't. Thank you.

13 "The State Activities Division was created in 1962,
14 only four years after the Institute came into being. This
15 division initially and until two years ago was headed by a
16 great gentleman you know, Dr. Frank Welch, who had served as
17 Assistant Secretary in the Department of Agriculture." Do
18 you hire a lot of ex-government employees?

19 A. No. We do have ex-government employees.

20 Q. You have administrative aids to congressmen and
21 things like that?

22 A. We have people who have had government experience,
23 yes, sir, as we want to get people that are qualified to
24 do --

1 Q. "In 196 --" oh, excuse me, sir.

2 A. Go ahead.

3 Q. "In 1967 it was decided that it was in the best
4 interest of the Institute and the industry to have its own
5 in-house PR staff. After great searching, Mr. William
6 Kloepper who was employed --" I left the P out of his name.
7 I am going to put it right in there right now. "He had
8 served in the government and in the drug industry for several
9 years before coming to the Institute." So actually Mr.
10 Kloepper was there before Mr. Kornegay, wasn't he?

11 A. Yes, it would appear.

12 Q. And Mr. Kloepper stayed there from 1967 to -- what
13 did you say, '85 yesterday?

14 A. I think that was the year, Mr. Cook.

15 Q. Is he still around? Is he still alive?

16 A. Yes, sir, he is.

17 Q. Where does he live?

18 A. He lives in [DELETED]

19 Q. Not very far from you?

20 A. That's correct.

21 Q. Do you see him occasionally?

22 A. Yes, sir, I do. He drops by.

23 Q. Does he consult with you on how --

24 A. No.

1 Q. He is retired?

2 A. He drops by because he has some friends down there
3 like any former employee.

4 Q. Okay. Now, Mr. Kloefer, would he have been, before
5 he retired, the number two man in the Institute?

6 A. Before he retired, he was not the number two man.
7 When Mr. Kloefer worked for me, I don't have a number two
8 man, sir.

9 Q. You have a number of one through four.

10 A. Well, I divided up into divisional responsibilities.

11 Q. And he would have headed one of the divisions?

12 A. Yes, sir.

13 Q. When you came there and you were hired, there was
14 Kornegay. Was Kloefer number two man then?

15 A. No, sir. I don't -- no. Mr. Kornegay didn't have
16 an assistant as such. He had a federal relations person,
17 state activities person.

18 Q. And a PR person?

19 A. And a PR person.

20 Q. And that would have been Kloefer?

21 A. Yes, sir.

22 Q. Mr. Merryman would have been working for Kloefer?

23 A. That's correct.

24 Q. Okay. And the next thing it talks a little bit

1 about the Federal Trade Commission became interested in
2 testing cigarettes. We'll get back to that. "In 1970 the
3 staff was increased by adding a director of statistics and a
4 medical director." That was a doctor, right, a physician?

5 A. I don't know who was the person that they had. They
6 did have former doctors on the staff.

7 Q. Let's go to the next page. The bottom question
8 says, "A question which often arises about the Institute is
9 who decides what to do, who makes the decisions and who sets
10 the policy. We have broad latitude for decision making on a
11 day to day basis at the staff level, the overall policies of
12 the Institute are set by the Executive Committee, which is
13 composed of the chief executive officers and the head of the
14 tobacco division of each of the five major companies which
15 support the Institute. This group meets six times a year to
16 receive staff reports and to decide basic policy."

17 Now, the decision about whether or not to accuse the
18 Surgeon Generals of fabricating evidence, would that be
19 policy or would that be day to day business? Who would make
20 that decision, the Executive Board or the President of the
21 Tobacco Institute?

22 A. That decision would have been based -- been staffs.
23 It's not a policy decision.

24 Q. So you could make a decision today to print a

1 handout like this saying that the -- that a broad hoax and
2 fabrication has been perpetrated by Koop on the public? You
3 could do that, make your mind up to do that yourself and let
4 that go through?

5 A. I wouldn't do that, but --

6 Q. I know that you wouldn't do that. But you could do
7 that?

8 A. I could do that.

9 Q. You wouldn't feel any necessity to confer with the
10 Chief of the Executive Committee before you decided to attack
11 a --

12 A. I certainly would be aware of my facts before I took
13 issue with any report. Because I don't have that discipline,
14 I would make sure that the appropriate people looked into it
15 and verified the industry position.

16 Q. Just so that I understand, in your opinion, it would
17 be extremely unlikely that something accusing people of
18 deceptive propaganda and fabricating evidence and committing
19 a hoax, it would be unlikely that the Tobacco Institute would
20 send this out without conferring with the Executive
21 Committee, isn't it?

22 A. We would give it -- give the information to the
23 Executive Committee like we would anyone else, sir.

24 Q. Right.

1 A. I mean they get our publications, yes.

2 Q. I understand. But I am just asking. And I know you
3 weren't there in 1971. Before you committed a budgetary
4 expense to print something like that and especially since it
5 brings you in conflict with the government or some portion of
6 the government, it would be unlikely that you would do that
7 without informing the Executive Committee in advance that you
8 were going to do it and conferring with them. Isn't that
9 true?

10 MR. CRIST: Your Honor, I object to this because he
11 is asking Mr. Chilcote about a '71 document. Mr. Chilcote
12 wasn't there. And then he is trying to do it in the context
13 of procedure. But the point here, Mr. Chilcote's tenure -- I
14 think Mr. Chilcote has testified that there has been no such
15 thing issued during his tenure. It's an impossible question
16 to answer.

17 MR. MACDONALD: We would join in that, your Honor.

18 THE COURT: The objection is overruled.

19 MR. COOK: May I see 40 -- I believe it's -- no,
20 it's Mr. Chilcote's statement. Do you know -- thank you.
21 I'm sorry.

22 Q. (By Mr. Cook) Mr. Chilcote, have you put out any
23 pamphlets about smoking other than helping teenagers, telling
24 teenagers it's the law since you have been President of the

1 Tobacco Institute?

2 A. I can't recall any. I would suspect that we have,
3 but I can't think of any, sir.

4 MR. COOK: Do you mind if I number the pages on this
5 document?

6 MR. CRIST: What is it, Bruce? Oh, no. Just write
7 them in.

8 MR. COOK: I am going to write 1, 2, 3, 4, 5, 6, 7.

9 MR. CRIST: That's fine.

10 MR. COOK: With the court's permission?

11 THE COURT: Is that 16A?

12 MR. COOK: Yes, sir.

13 THE COURT: You may proceed.

14 MR. COOK: May I -- I am going to just write numbers
15 on the exhibit.

16 THE COURT: Okay.

17 Q. (By Mr. Cook) I am going to refer you to -- I have
18 paginated this now so you and I don't get mixed up again.

19 I am going to refer you to page 7 of Exhibit 16A.
20 If you want to look at the cover of that, that's a copy of
21 your interview in the US Tobacco Journal that was made in
22 1981. I believe it has the date of October 8, 1981, on it.
23 If you will look on page 7 at the top, you will see that you
24 referred to a publication that you were going to rely on or

1 send out. I believe it was 27 questions about what, 21
2 questions about --

3 A. Another -- yes, 21 Questions About Smoking.

4 Q. All right. Do you remember that?

5 A. I can't remember that, no, sir.

6 Q. But you wouldn't know whether you conferred with the
7 Executive Board before you put that out or not?

8 A. I did not confer with the Executive Board concerning
9 this press release, this interview.

10 Q. No, not about the press release. I was talking
11 about the 21 Questions.

12 A. I don't recall, sir. If you -- you would have to
13 refresh -- see the document.

14 Q. Fine. I will show it to you later if you would
15 like.

16 MR. MACDONALD: I'm sorry, your Honor. I didn't --

17 MR. COOK: He said he would like to see the
18 document. And I don't have it in hand. If you have it, I
19 will show it to him if you want.

20 MR. MACDONALD: No, I don't --

21 THE COURT: That's all right. Mr. Cook, you can
22 move along.

23 Q. (By Mr. Cook) Okay. Now, on page 6 then at the
24 bottom of President Kornegay -- or did you call him --

1 A. You are going --

2 Q. Oh, yes.

3 A. Which one are we going with now?

4 Q. We are passing on here.

5 A. All right.

6 Q. Who is Michael Conrad?

7 A. Michael Conrad was a Hill Street Blues TV, right.

8 Q. The Sergeant.

9 A. Sergeant.

10 Q. The guy that says, "You all be careful out there."

11 A. Right.

12 Q. Right? Remember that?

13 A. Yes, sir.

14 Q. He did -- he did a commercial for you, did he not?

15 A. Yes, he did a commercial or film. It wasn't really
16 a commercial. It was a film. Gee, that has been a long time
17 ago.

18 Q. Do you remember what happened to Michael Conrad?

19 A. No, sir.

20 THE COURT: Is there a purpose for me in taking
21 this?

22 MR. COOK: No. I just thought that you were
23 collecting them, Judge.

24 THE COURT: I am. Thank you.

1 MR. COOK: I just gave it back to you.

2 Q. (By Mr. Cook) Talking about the Institute's
3 involvement at the government, at the federal level, he says,
4 "We deal with the Congress. We deal with departments and
5 agencies of government such as HEW, the Department of
6 Agriculture, FTC, FCC, CAB, FAA and ICC." I didn't write
7 that down. The ICC is the Interstate Commerce Commission, is
8 it not?

9 A. Yes, sir.

10 Q. That's an independent regulatory agency in the
11 United States Government, is it not?

12 A. Yes, sir.

13 Q. Why do they call them, if you know, independent
14 regulatory agencies?

15 A. I do not know.

16 Q. Okay. You know they are called that?

17 A. Yes.

18 Q. And recently a new one has come about the scene
19 which you have no doubt heard a great deal, the Consumer -- I
20 guess I had better write this down -- Product Safety
21 Commission. Are you familiar with the Consumer Product
22 Safety Commission?

23 A. Yes, I am.

24 Q. Do they have any jurisdiction over tobacco products?

1 A. I don't know if they do --

2 MR. CRIST: I object. It is calling for a question
3 of law.

4 MR. MACDONALD: Join in that, your Honor.

5 THE COURT: I believe he has answered that he didn't
6 know. The objection was slightly late. Did you want to
7 speak further to the objection?

8 MR. CRIST: Your Honor, I was having trouble getting
9 out of my chair. I apologize.

10 THE COURT: Okay.

11 MR. CRIST: I didn't mean to be untimely.

12 THE COURT: Happens to me, too. All right. You may
13 proceed.

14 Q. (By Mr. Cook) "The Administration meaning the White
15 House." And he states that, "The first big legislative
16 battle dealing with the highly emotionally issue of smoking
17 and health began shortly after the Surgeon General's report
18 of 1964. As all of you know, this now famous report, which
19 was merely a compilation of some old research reports,
20 concluded that cigarette smoking is a --" is that a? Mine is
21 cut off.

22 A. Is a sufficient -- a, yes, sir.

23 Q. "-- sufficient health hazard to warrant remedial
24 action."

1 MR. CRIST: I object on the basis of lobbying.

2 THE COURT: Overruled.

3 Q. (By the Court) Then he says that, "A race developed
4 between Congress and the FTC to see who could be the first
5 one to impose some penalties upon the tobacco industry." Is
6 that true?

7 A. I don't know if it's true or not, sir.

8 Q. No. I mean that's what he said. I don't know
9 whether it's true or not. I was --

10 A. That's what he said.

11 Q. You wouldn't think Mr. Kornegay would -- I mean is
12 there a reason to think that Mr. Kornegay would print
13 something for the Tobacco Institute that he thought was
14 untrue?

15 A. No. That's not Mr. --

16 Q. And you do agree that this was printed by the
17 Tobacco Institute?

18 A. Yes, sir.

19 Q. Okay. "The much more reasonable and, in my view,
20 knowledgeable Congress finally won the race with the
21 enactment in 1965 of the Cigarette Labeling and Advertising
22 Act." And then he stated, "In 1965 the first major bill
23 which was the product of the smoking and health controversy
24 came into being. It did two things. The most notable was

1 that each package of cigarettes contain a caution notice.
2 The second was --" I can't read that word -- "was to
3 enact --"

4 A. Enact.

5 Q. " -- a preemption clause which in effect reserved
6 unto the Congress the authority to deal with advertising and
7 the caution notice to be placed on the containers."

8 Then in the next paragraph it talks about the FTC
9 quite a bit and it said, "For years this agency wanted to
10 require what we call the 'death notice' on all containers of
11 cigarettes and in all cigarette advertising."

12 And on the next page Mr. Kornegay says what he
13 thought the FTC -- the Federal Trade Commission? Is that
14 what the FTC is?

15 A. Yes, sir.

16 Q. All right. "Their warning goes like this.
17 Cigarette smoking is dangerous to your health and will cause
18 death from lung cancer, coronary heart disease, bronchitis,
19 emphysema and other diseases." It says that, doesn't it?

20 A. Yes, sir.

21 MR. COOK: May I approach the bench, your Honor?

22 THE COURT: Yes. Gentlemen?

23 (The following proceedings were held at the bench
24 out of the hearing of the jury.)

1 MR. COOK: Is that okay or am I approaching --

2 MR. CRIST: Are you going to read that or go
3 beyond --

4 MR. COOK: I'm going to read it. Do you have an
5 objection to me reading it?

6 MR. CRIST: Depends on where you go after that.

7 MR. COOK: No. If you don't have an objection, then
8 I don't have any problem.

9 (The following proceedings were held in open court
10 in the presence and hearing of the jury.)

11 THE COURT: All right. Proceed.

12 MR. CRIST: Going how far?

13 MR. COOK: Well, I am going to continue on with the
14 exhibit, but I just wanted your input.

15 Q. (By Mr. Cook) The next paragraph says, "To make a
16 long tory short, a bill was introduced and finally became law
17 in 1970 which did four major things. The caution notice was
18 changed to its present wording. Two, it prohibited
19 advertising of cigarettes on the electronic media. It made
20 the preemption clause, state and local authorities,
21 permanent. And it required an annual report from the Trade
22 Commission and HE --" I'm sure that's W, isn't it?

23 A. Yes, sir.

24 Q. Okay. Now, let's see. You have been working in

1 Washington for how many years?

2 A. Twenty years.

3 Q. And did you have dealings with the FTC when you were
4 with the liquor industry?

5 A. Very little.

6 Q. Okay. What is your understanding of what the FTC
7 has to do with your industry?

8 MR. CRIST: Your Honor, I object. The witness has
9 said he has very little knowledge about it. It's also a
10 question of law with respect to what the involvement of the
11 FTC is. I'm not sure which --

12 MR. COOK: I don't think he said that about the FTC.

13 THE COURT: Hold on. Let him finish.

14 MR. CRIST: Whatever industry it was that was being
15 asked about.

16 THE COURT: All right. Mr. MacDonald, do you
17 want --

18 MR. MACDONALD: We join under the same basis.

19 THE COURT: All right. Objection is overruled.

20 Q. (By Mr. Cook) The Federal Trade Commission, it
21 would be your understanding that that is a commission
22 of -- of an independent regulatory agency that has to do with
23 regulating industries so there is not deceptive or unfair
24 advertising practices. That's true, is it not?

1 MR. CRIST: I object. This witness is not a lawyer.
2 The question is wrong. It's just an improper question.

3 MR. MACDONALD: Also -- we join, your Honor. Also
4 relevance, too.

5 THE COURT: Mr. Cook, did your question contain
6 whether that was his understanding?

7 MR. COOK: Yes, sir.

8 THE COURT: All right. The objection is overruled.

9 THE WITNESS: Mr. Cook, I don't know the charter of
10 the Federal Trade Commission. We are not involved in trade
11 matters.

12 Q. (By Mr. Cook) What is your general understanding
13 about what to do? I mean that's my -- I asked you if your
14 understanding was the same as mine. I'm sure it's not
15 precise. We can do that later or I can go get a book and you
16 and I can read it if you want. But wouldn't you agree that
17 the FTC's set out purposes is that it's supposed to regulate
18 and prevent deceptive and unfair advertising of products?

19 A. That's what --

20 MR. CRIST: Objection. Same objection, your Honor.

21 MR. MACDONALD: Join.

22 THE COURT: Overruled.

23 THE WITNESS: I understand that that is one of their
24 functions, yes, sir.

1 Q. (By Mr. Cook) Okay. I'm sure that they have
2 others.

3 A. Yes, sir.

4 Q. Let's pass on to page 9 of the document. Again
5 talking about the federal activities. He said that
6 they -- that "We maintain a constant alert on who introduces
7 these bills, what committees they are referred to and what
8 action, if any, is being contemplated." You do that, don't
9 you?

10 A. Yes, sir.

11 Q. Okay. You also monitor the television, electronic
12 and print media in the United States to see when things -- or
13 when people are talking about tobacco issues, do you not?

14 A. Governmental issues, yes, sir.

15 Q. How about other types of issues?

16 A. Like?

17 Q. You know, like tobacco and health.

18 A. Yes. If it's an independent source, newspaper, we
19 would clip that and pass it around for information.

20 Q. How do you do that? Is there some kind of service
21 that monitors the television for you and --

22 A. No. We do not monitor television. We have a
23 clipping service, sir.

24 Q. What is a clipping service?

1 A. It's a company that goes through newspapers
2 or -- you know, picks out -- I don't know if we still have
3 that service. I think our librarian does it now. We don't
4 do it across the United States. We do it only in major
5 markets.

6 Q. Is St. Louis a major market?

7 A. Yes. I'm sure we have clipping services here. And
8 my field division will --

9 Q. You don't know if you take the News Democrat or not?

10 A. My field division will also -- if there is something
11 that appears in the newspaper, they will send it in.

12 Q. Okay. It says, "Our function at the Institute is
13 not only to oppose bills that are harmful to the industry.
14 We also, on hearing that a member of Congress is thinking
15 about introducing a bill, attempt to educate him on why such
16 a bill should not be introduced. You might call this
17 preventative medicine.

18 MR. CRIST: Objection, your Honor, lobbying.

19 MR. MACDONALD: Same objection, your Honor.
20 Lobbying.

21 THE COURT: Excuse me a minute, Mr. Cook. Let me
22 double check something here. Do you request a limiting
23 instruction, Mr. Crist?

24 MR. CRIST: Yes, your Honor.

1 THE COURT: Ladies and gentlemen, Mr. Cook has
2 touched on an area that the Court has previously instructed
3 you on. You should be aware that evidence of the political
4 activities or lobbying activities of any of the defendants
5 should not be considered by you as evidence to impose
6 liability in this case. It's admitted for a purpose other
7 than that. And, Mr. Cook, with that limiting instruction,
8 are you ready to proceed?

9 MR. COOK: Yes, sir, I am.

10 Q. (By Mr. Cook) Do you discipline or -- maybe that's
11 not the correct word. The word that I use with respect to
12 the Northwest Airlines. Do you retaliate, the Tobacco
13 Institute, against officials who are opposed to your point of
14 view?

15 A. No, sir, I don't believe we do.

16 Q. Is the term -- do you rebuke them? Do you
17 understand -- that's kind of like canard. Let me tell you
18 what the good old dictionary says. I'm sure everybody knows
19 what retaliate means. I use the word rebuke and it says, "To
20 reprove sharply, reprimand." Would that be your
21 understanding of the word rebuke?

22 A. Yes, sir. That would be my understanding.

23 Q. Do you reprimand public officials? Is that one of
24 the roles of the Tobacco Institute?

1 A. No, sir. We will disagree, but we can't reprimand.

2 Q. You don't ever cause them any trouble or anything
3 like that or threaten them or anything of that nature, people
4 who don't agree with you?

5 A. Mr. Cook, not -- I have never done anything like
6 that.

7 Q. Has it been done on your watch?

8 A. Not to my knowledge, no, sir.

9 MR. COOK: May I ask you the number of that one,
10 please?

11 MR. HEPLER: 16E.

12 MR. COOK: Thank you.

13 MR. MACDONALD: Your Honor, could we approach the
14 bench on this document?

15 THE COURT: Certainly.

16 (The following proceedings were held at the bench
17 out of the hearing of the jury.)

18 MR. MACDONALD: Your Honor, I think that the --

19 MR. COOK: I am not going into the underlying
20 article of Koop. I'm on a different topic.

21 MR. MACDONALD: The problem is the exhibit that he
22 has -- and I wanted to verify it. The second page talks
23 about ETS and Koop's position.

24 THE COURT: The second page won't be --

1 MR. MACDONALD: But the document talks about his
2 position on that. I mean, in other words, because Koop took
3 a certain position, there is a certain action involved.

4 MR. COOK: The topic is do you threaten public
5 officials.

6 MR. CRIST: Judge, this is getting too loud for the
7 jury. If you take off the second page, you are going to be
8 leaving a false impression with the jury.

9 THE COURT: As opposed to the false impression that
10 contradicts the witness?

11 MR. CRIST: No. It doesn't contradict the witness.
12 He has no recollection of it.

13 MR. COOK: You must not have been listening. He
14 is --

15 THE COURT: The witness is advised not to get into
16 this, I take it. I mean he is not going to go, "Well, that's
17 about something else that is unrelated. It was sidestream,"
18 or something like that. He is aware of the -- that he is not
19 required to get into it, isn't he?

20 MR. MACDONALD: I don't know if he is at this
21 moment. But we might want to take a two-minute break.

22 THE COURT: I wouldn't mind if you --

23 MR. COOK: I am not going to be bringing up the
24 topic.

1 THE COURT: Well, if you ask a leading question that
2 does not evoke the underlying reason -- and if he gets into
3 it, I will interrupt him and we'll go out of the presence of
4 the jury.

5 MR. COOK: Judge, I might point out that the
6 environmental smoke issue is going to come in in this case
7 anyway. And --

8 THE COURT: We'll have to -- if what you are saying
9 is you want to get this in front of the jury at this
10 point --

11 MR. COOK: No. I don't at this point.

12 THE COURT: All right. Then we'll take up the other
13 comment --

14 MR. CRIST: The other objection, your Honor, is
15 there is a suggestion here that this was consummated. There
16 is no evidence this was ever consummated. This is something
17 only given consideration to be a possible approach to it.

18 THE COURT: I think, Mr. Cook -- I agree with that.
19 I think for this to be truly impeaching or to refresh his
20 recollection -- you can show it to him to refresh his
21 recollection -- you would have to show that there was some
22 actual rebuke.

23 MR. MACDONALD: Or that he knew of it.

24 MR. COOK: It doesn't make any difference. This is

1 a record made internally.

2 MR. CRIST: Don't get too loud.

3 MR. COOK: An internal record requesting that Koop
4 be rebuked. It doesn't make any difference whether Koop was
5 rebuked. It has to do with whether or not that was one of
6 their policies. I have asked him that and he said no. I
7 said, "Under your watch?" "No."

8 MR. CRIST: It doesn't say --

9 THE COURT: All right. It's overruled.

10 (The following proceedings were held in open court
11 in the presence and hearing of the jury.)

12 Q. (By Mr. Cook) Mr. Chilcote, who is, was, Howard
13 Liebengood?

14 A. Howard Liebengood was Senior Vice President in
15 charge of federal affairs before Mr. Lewis.

16 Q. Mr. Lewis. And I believe we have talked about who
17 is Mr. William Kloepfer, Jr., before. Is that true?

18 A. Yes, sir.

19 Q. All right. I am going to hand you what has been
20 marked Plaintiff's Exhibit No. 16E and ask you if you are
21 familiar with that document.

22 A. I am not familiar with the document, no, sir.

23 THE COURT: We needn't get into the contents.

24 THE WITNESS: Are you referring to the first page or

1 second page, sir?

2 Q. (By Mr. Cook) I am referring to the first page.

3 A. Oh, first page.

4 Q. I am referring to the whole document as far as being
5 familiar with it. I would suggest that you wait until I ask
6 a question before you answer.

7 Now, sir, that would appear to be a document that
8 was made by your vice president in charge of public relations
9 or public affairs to your vice president in charge of
10 government relations. Is that true?

11 A. Yes, sir.

12 Q. And in that concerning a statement by Dr. Koop,
13 without relating what the subject is, that Mr. Kloefer
14 requested that Mr. Liebengood get a member of Congress to
15 rebuke Dr. Koop. Isn't that also true?

16 MR. CRIST: Your Honor, I object to it. It's not
17 what the document says. And the document speaks for itself.

18 MR. COOK: Oh, that's fine. I'll be glad to use the
19 document. I'll move its admission then, your Honor.

20 MR. MACDONALD: Also lobbying, your Honor.

21 THE COURT: I didn't hear what you --

22 MR. MACDONALD: Objection, lobbying.

23 THE COURT: Overruled.

24 MR. COOK: Your Honor, I would like to display the

1 document to the jury in the form of a blowup, just this page.

2 THE COURT: All right.

3 Q. (By Mr. Cook) Why don't we go through this together
4 then, Mr. Chilcote, remembering that you agreed that rebuke
5 means reprimand, right? Is that true? Rebuke means
6 reprimand?

7 A. Yes, sir.

8 Q. Okay. January 27, 1984, who was president of the
9 Tobacco Institute?

10 A. I was.

11 Q. All right. Howard Liebengood was your director of
12 public -- I mean of federal affairs. He dealt with the
13 federal government?

14 A. Yes, sir.

15 Q. And Mr. Kloepper was your vice president in charge
16 of private affairs. Is that true?

17 A. Yes, sir.

18 Q. And he wrote to Liebengood and said, "This quotation
19 by Dr. Koop is absolutely unwarranted and is thoughtless on
20 the part of any high government health official. One way it
21 could be dealt with would be a rebuke from a member of
22 Congress and a documentation for his assertion. Otherwise,
23 because his statement originally appeared in a medical
24 journal, we are going to hear too many echoes of it." How do

1 you -- how do you get members of Congress to rebuke the
2 Surgeon General of the United States, Mr. Chilcote?

3 MR. CRIST: Your Honor, I object. That's not what
4 the document says.

5 THE COURT: No. It's a different question. It's
6 overruled.

7 Q. (By Mr. Cook) How do you do that?

8 A. You can't do it. I don't know how you do that. A
9 member of Congress will do what he wants to do, sir.

10 Q. How would you go -- you -- the Tobacco Institute has
11 no right -- I guess you do. You have a right to do what you
12 want. We have said that. The Tobacco Institute, you would
13 agree, should not try to threaten public officials, public
14 health officials with reprimands. You would agree with that,
15 wouldn't you?

16 MR. CRIST: I object. That's not what the document
17 says.

18 MR. COOK: I didn't say a document said it.

19 MR. CRIST: You are pounding on the board, Bruce.

20 THE COURT: Overruled.

21 Q. (By Mr. Cook) The Tobacco Institute should not
22 threaten public health officials with reprimands or
23 discipline if they don't agree with them, should they?

24 A. No. The Tobacco Institute does not do that, sir.

1 Q. The -- it was just one of Kloepper's ideas and it
2 wasn't done?

3 MR. MACDONALD: Your Honor, I object. That
4 mischaracterizes that. He is holding the document. And I
5 think it's a mischaracterization of the document he is
6 testifying to.

7 THE COURT: Overruled.

8 Q. (By Mr. Cook) How do you know this wasn't done?

9 A. I don't know if it was done or not done. I
10 just -- this is a memo, a suggestion the way I read this,
11 sir.

12 Q. Do you know who centered --

13 A. He had no supervisory -- Mr. Kloepper had no
14 supervisory capacity. One division head does not have any
15 supervisory capacity over another. They are in equal status.

16 Q. So if they want to reprimand members of Congress,
17 the best thing, I guess, to do would be to go through you?

18 A. Well, I would hope they -- we do not reprimand
19 members of Congress, sir.

20 Q. Do you campaign against people who disagree with
21 you?

22 MR. CRIST: I object, your Honor. This is protected
23 First Amendment activity.

24 MR. MACDONALD: Join.

1 THE COURT: Do you want the limiting instruction?

2 MR. CRIST: Yes.

3 THE COURT: All right. Once again, ladies, the
4 political activity of the Tobacco Institute or any of the
5 other defendants cannot be used and is not admitted for the
6 purpose of establishing liability for the plaintiff's claims,
7 but rather for a separate purpose of establishing the
8 knowledge of the defendant in this case.

9 Q. (By Mr. Cook) Do you campaign against the people
10 who disagree with you?

11 A. No. We do not campaign against -- we will state our
12 position. We do not do --

13 Q. You don't --

14 A. We don't go out and run political campaigns.

15 Q. You would give money to somebody's --

16 A. I'm sorry?

17 Q. -- opponent.

18 MR. CRIST: Your Honor, same objection.

19 THE COURT: All right. Noted. Overruled.

20 MR. MACDONALD: Join, your Honor.

21 Q. (By Mr. Cook) For example -- let's just use an
22 example. And we have talked about Hatch and Kennedy. Who
23 would you say -- if you had to pick a Congressman, who would
24 you say that probably was the most anti-tobacco of all of the

1 Congressmen?

2 MR. CRIST: Objection. Same objection, your Honor,
3 and with relevance and materiality.

4 THE COURT: Overruled.

5 MR. MACDONALD: Join.

6 THE COURT: Overruled.

7 THE WITNESS: Mr. Cook, there are many members of
8 Congress that disagree with our position. There are some
9 members of Congress that agree with our position some of the
10 time and other times they don't agree with our position.

11 Q. (By Mr. Cook) Do you recall my question?

12 A. I don't rate Congressmen in terms of where they
13 stand on our issues. Some of them agree. Some of them don't
14 agree with us.

15 Q. Wouldn't you agree, sir, that probably the most
16 vocal opponent of your industry in terms of health and
17 smoking in the United States Congress is Congressman Mike
18 Synar from Oklahoma?

19 MR. CRIST: Same objection, your Honor.

20 THE COURT: Overruled.

21 THE WITNESS: Mr. Cook, I would -- it all depends on
22 the issues. Some Congressmen are more concerned about one
23 issue. Mr. Synar was opposed to advertising. I don't know
24 how he stands on our other issues. Mr. Waxman has been very

1 involved in our industry.

2 Q. (By Mr. Cook) Henry Waxman from California?

3 A. From California.

4 Q. I don't think I was fair to him. I think he and
5 Synar probably would be about on the same level.

6 A. But they do disagree and agree with one another.
7 And they both serve on the same committees. And I could
8 think of other congressmen. We would hope that they would
9 listen to our position and we attempt to provide that
10 information.

11 Q. Of course, congressmen have to run every two years,
12 don't they?

13 A. Yes, sir.

14 Q. Do you have any idea how much money the tobacco
15 industry, your members and your Institute, donated against
16 Congressman Synar in his primary election for re-election
17 against a -- an incumbent against non-incumbent? Do you have
18 any idea?

19 MR. CRIST: I object. This is protected First
20 Amendment activity. It's also irrelevant and immaterial.

21 MR. MACDONALD: Your Honor, we join in those and
22 specifically also with respect to political contributions
23 which are regulated by law. It's also totally irrelevant to
24 Mr. Kueper in this case.

1 THE COURT: All right. What time do we have?

2 MR. CRIST: 11:30, 11:40.

3 MR. COOK: Twenty to 12:00, Judge.

4 THE COURT: We are going to break this morning.

5 Let's be back ready to resume at 1:15.

6 (The following proceedings were held out of the

7 presence and hearing of the jury.)

8 THE COURT: You may expand on your objection. I
9 don't know if you have to expand on it. Mr. Cook, this is
10 fairly obviously pure political activity. I want you to tell
11 me what issue it advances in this case and under what theory
12 you deem this admissible.

13 MR. COOK: Your Honor, this man has testified
14 that -- to a lot of things. But one of the things that he
15 testifies is that they don't discipline, they don't
16 retaliate, they don't get even with government officials. As
17 you can see already -- they don't rebuke public officials.
18 The reprimands from them that they report in their documents
19 to members of Congress, to high public officials, the things
20 that they have done to insure that our government is
21 corrupted by fear and threat is unspeakable. Now, one of the
22 things that he says that they don't do is they don't
23 retaliate against congressmen. There are other people that I
24 have taken their depositions that say, "No, we campaign for

1 people. We don't campaign against people." Congressman Mike
2 Synar is, with the possible exception of Henry Waxman, the
3 most outspoken opponent of tobacco and tobacco advertising in
4 the United States Congress. The Tobacco Institute and the
5 tobacco industry just came after him in his immediately last
6 primary election.

7 It isn't to prove that they came after Congressman
8 Synar. It's to prove that the testimony of Mr. Chilcote is
9 not true.

10 MR. CRIST: Your Honor --

11 MR. COOK: And it's just --

12 THE COURT: Let's let the jury in.

13 (At this time jurors walked through the courtroom
14 and then left the courtroom.)

15 THE COURT: Okay. I think I get your point.

16 MR. COOK: While political activity is protected,
17 your Honor, conspiracies to punish and to reprimand and
18 discipline and threaten the government with respect to trying
19 to force them to disobey their sworn duty is not -- is not a
20 protected activity to the extent that the limited privilege
21 cannot be done away with by intentional misconduct on their
22 part.

23 MR. CRIST: Your Honor, may I respond?

24 THE COURT: So you are essentially showing that what

1 their political activity was was wrong social policy and
2 that's the purpose that you want to admit it for?

3 MR. COOK: No. Well, in this particular
4 instance -- I think that that's true. But in this particular
5 instance, Judge, that this man has said that they do not
6 retaliate to people who are against them. Right now it's to
7 prove that -- it's impeachment of him to show that, in fact,
8 contrary to what he says that they don't rebuke people, that
9 they don't retaliate, they, in fact, do. That is admissible
10 in that regard if for no other. I think it's admissible for
11 both.

12 THE COURT: Respond to the last comment, please.

13 MR. CRIST: Your Honor, I did want to respond to it.
14 I think you are right. It's pure political activity. But
15 with respect to the last comment, Mr. Cook insists that he
16 has a right to set up straw men. And when he doesn't get a
17 witness to admit what the witness -- when a witness disagrees
18 with him, then he says he is entitled to impeach him with
19 pure -- purely protected First Amendment activity, your
20 Honor. And he has done it time and time again. He is
21 injecting prejudice into this case. And then he comes up and
22 says, "I am entitled to impeach the witness because the
23 witness didn't agree with me." And what we are doing is we
24 are infecting this process, your Honor, by having Mr. Cook

1 come in the back door when the front door has been slammed in
2 his face. And it has been slammed in his face because the
3 First Amendment says this.

4 Should we be having evidence in this case that the
5 American Trial Lawyers Association contributed heavily to the
6 Clinton candidacy because they did not like the Bush policy
7 with respect to federalizing tort litigation? No. That's
8 not disciplining President Bush. That is part of the
9 political process of the United States. And he is not
10 entitled to get into it.

11 Simply by calling it discipline or retaliation is
12 nonsense, your Honor. It is a pure, protected First
13 Amendment activity. That's the way this country works.

14 And if we have to get into Mike Synar's billings,
15 you will find out that the amount of money that he received
16 from a whole variety dwarfs any amount that this industry,
17 even collectively, could have conceivably have contributed to
18 his opponent in the primary or at other times.

19 We are moving into areas which are extraordinarily
20 collateral. And, your Honor, the fundamental fact is that it
21 shouldn't be part of this case at all. And it's
22 purely protected activity guaranteed by the First Amendment
23 of the United States Constitution.

24 Time and again we have had these question which are

1 introducing prejudice, your Honor. And it has now gotten
2 past the point that the defense can even hope to receive a
3 fair trial because Mr. Cook insists on doing what he knows he
4 is not entitled to do.

5 THE COURT: All right.

6 MR. MACDONALD: Your Honor, may we --

7 THE COURT: I don't think opposing a politician or
8 supporting his opponent amounts to conduct that is
9 necessarily inconsistent with the reason that you tender this
10 as impeachment, that is, that he denies that they retaliate
11 or rebuke. So, therefore, it's not impeaching.

12 And I am going to sustain the objection with respect
13 to the campaign contributions related to this topic.

14 MR. COOK: Your Honor, then I would offer it for the
15 purpose to show course of conduct on the Tobacco Institute in
16 terms of proceeding with their goal of duping the public and
17 a portion of their goal being trying to intimidate, threaten
18 public officials and private companies such as Northwest
19 Airlines, Attorney General Koop and Consumer Product Safety
20 Commission Director Simpson and on and on and on.

21 There comes a time, your Honor, when their conduct,
22 how they have run their business -- this is protected
23 activity. Also rebuking Dr. Koop is protected activity. I
24 mean if you can get that done, you can do it. But it shows

1 their motive and intent. And I would offer it in that
2 regard, too.

3 THE COURT: You are offering it to show their
4 motive --

5 MR. COOK: The way they operate, their intent.

6 THE COURT: For the truth of the matter asserted?

7 MR. COOK: For the truth of the matter asserted.

8 THE COURT: That they do it this way and that,
9 therefore, they are wrong.

10 MR. COOK: Willful and wanton misconduct. They are
11 trying to cause people --

12 THE COURT: They are allowed to do it that way.
13 They are not wrong. They are not to pursue political --

14 MR. COOK: No. You are allowed to do a lot of
15 things that aren't wrong that are torts.

16 THE COURT: Yes, but I think -- well, it's clear
17 that this isn't a tort to support a campaign --

18 MR. COOK: No. But it may be evidence of a tort.

19 THE COURT: Okay. I agree with the defendant's
20 objection on this point.

21 MR. CRIST: Your Honor, I know that there were a
22 couple housekeeping matters. Could I take them up quickly?

23 THE COURT: Yes. Go right ahead.

24 MR. CRIST: I don't know that we need to resolve

1 them now. One is, your Honor, is what the Court would like
2 to do with respect to errata on the transcript. And I make
3 that in particular because a number of the reporters noted in
4 my opening statement that they were unable to get some of it
5 down. And there are some mistakes that I noted on looking at
6 the transcript this morning. So I would like to be able to
7 deal with that in some fashion.

8 MR. COOK: No. I don't think that on official
9 transcript is that it's like a deposition. I don't think
10 that there is an errata. There is what is called a
11 Bystander's Transcript which you are welcome to make.
12 And -- but that is the official way of correcting official
13 transcript.

14 THE COURT: I did not sign the transcript. Of
15 course, I don't have to. I mean it's not required by statute
16 that I sign the transcripts. It would be virtually
17 impossible for me to read every one as we go through this.
18 If you want to submit a Bystander's Report on this issue,
19 I'll rule on the -- whether it's correct.

20 MR. CRIST: I know there are places in the
21 transcript which are wrong, your Honor. And I don't want to
22 have that --

23 THE COURT: I don't know that yet, but I will
24 certainly listen to your submissions and read them.

1 MR. CRIST: The second thing, your Honor, is that I
2 think there is some confusion among counsel with respect to
3 precisely which exhibits have been admitted. Is somebody
4 keeping a running list on that?

5 THE COURT: I do.

6 MR. CRIST: We try to do what we can.

7 THE COURT: I have admitted -- Mr. Cook, please,
8 double check. Because I don't want you to assume that
9 something has been admitted and it isn't. For instance, I
10 have not admitted page 5 that you viewed to the jury of 41
11 because it wasn't marked.

12 MR. COOK: Judge, I don't intend --

13 THE COURT: The big blowup.

14 MR. COOK: -- any of the blowups -- those are used
15 for purposes of illustration rather than --

16 THE COURT: I show 15A has been admitted. I show
17 15K, 16B. Although there has been reference to 16A, I have
18 not admitted it. 30A is admitted. 16G, H, I and J have been
19 admitted. 60 has been admitted.

20 MR. CRIST: Six zero?

21 THE COURT: Six zero. And that's all.

22 MR. CRIST: Okay. And one other brief thing with
23 respect to that, your Honor, and that is -- and it became a
24 more serious problem today with respect to some of those

1 Tobacco Observers. I think that there was a discussion about
2 their being admitted but we'll have to sort out later
3 precisely what is and what is not admitted.

4 MR. COOK: No. They are all admitted. What goes to
5 the jury --

6 MR. CRIST: And some of them need to be redacted.
7 No. The Court specifically reserved on Tobacco Observers on
8 that point. And I am just not sure which portions of which
9 documents are in evidence with respect to those that have
10 been admitted.

11 THE COURT: Well, maybe I didn't make myself clear.
12 Since it would be time consuming to go through an entire
13 lengthy document and strike out what is admitted, I have
14 admitted it subject to cautioning Mr. Cook not to use any
15 part of it without you allowing -- you interposing an
16 objection.

17 Secondly, it doesn't presuppose in admitting the
18 document that it would be sent to the jury in total or
19 published to the jury in total.

20 MR. CRIST: I guess my question is a housekeeping
21 matter of when are we going to sort out what is what? And,
22 in fact, I brought over this morning for the Court and Mr.
23 Cook a couple of the exhibits which had discussions about the
24 ETS issue, which the Court, of course, in its order in limine

1 has excluded and just redacted them and suggest that these be
2 used. And now the problem has become a broader problem. I
3 am just --

4 MR. COOK: Well, since it isn't -- you are not in
5 your case. It isn't your problem. It's my problem. And
6 then eventually it becomes the Judge's problem. I don't know
7 what they do where you are from, but customarily before
8 exhibits are sent to the jury or displayed to the jury, the
9 Judge looks at them and they are redacted. The Judge may
10 say, "This one is not capable of being redacted. It's not
11 going to the jury." And --

12 MR. CRIST: But, your Honor --

13 MR. COOK: -- maybe none of them will go to the
14 jury.

15 MR. CRIST: It is our problem. It is our problem.
16 Because it may be that there are portions of some documents
17 that Mr. Cook has used -- and I am not trying to steal
18 something I am not entitled to -- where he may have read this
19 paragraph and we want to read this paragraph. Okay.

20 MR. COOK: Go ahead.

21 MR. CRIST: Or require him to read that paragraph.

22 MR. COOK: You will show it to me, I assume, before
23 you read the same I have to show it to you.

24 MR. CRIST: Are we then going to be in a

1 position -- or that there is a paragraph in here, for
2 example, that may deal with ETS and shouldn't be in here, but
3 we want to display it to the jury. How do we physically
4 contend with that issue if we don't know --

5 MR. COOK: Well, you do that in your case.

6 MR. CRIST: Well, what about on redirect?

7 MR. COOK: Certainly the ETS issue is that -- you
8 are not bound by it. You want to raise it, go ahead.

9 MR. CRIST: No. I want it out of the exhibit. We
10 are going to have to deal with that. And there may be other
11 matters like that, too.

12 THE COURT: You mean if you are on direct after
13 Section 30 -- after Section 60 --

14 MR. CRIST: Right.

15 THE COURT: -- is done with Mr. Chilcote? You want
16 to know --

17 MR. COOK: Why don't you mark a separate exhibit?
18 You know the way that people do that is that you have a
19 separate exhibit. You have him identify it and then you
20 admit it in your case and then you show it to the jury.

21 MR. CRIST: But it has already been admitted over
22 our objection, your Honor. We are not going to be offering
23 something to which we have already objected.

24 THE COURT: I'll -- if you want to tender something

1 to publish to the jury, I will allow that for the purposes of
2 demonstration in your redirect examination.

3 MR. CRIST: Okay.

4 THE COURT: Whether -- you know, we'll take up when
5 it will be admitted as a separate exhibit. But I think you
6 can -- you can show a redacted version.

7 MR. CRIST: Okay.

8 THE COURT: You know, but you are going to be
9 redacting the issues that you are concerned with, especially
10 the ETS.

11 MR. COOK: Your Honor, I don't think I argued
12 against the ETS restriction to begin with. My physicians are
13 going to testify he has raised the issue of adenocarcinoma
14 frequently isn't associated with people who smoke and that
15 all the people who smoke don't have cancer -- I mean all the
16 people who get lung cancer don't necessarily smoke. I think
17 that physicians in this case are going to say that many of
18 those things have been explained now by the effect of
19 environmental tobacco smoke.

20 And I really don't understand -- and I think it's
21 just that I didn't take issue with it if I said I wasn't
22 going to bring it up -- why there is a motion in limine about
23 ETS. Why isn't ETS relevant to the issues in this case?
24 I -- certainly the Surgeon General says that people get lung

1 cancer from environmental tobacco smoke. One of the issues
2 that is going to come up in this case is that about 90
3 percent of the people who get lung cancer are smokers. Ten
4 percent of the remainder of the people who get lung cancer
5 were non-smokers. One of the explanations for that statistic
6 is that now they have discovered is that people who live with
7 smokers get lung cancer. And the Surgeon General has said
8 and the American Cancer Institute have said, all of them have
9 said, all of the approved guys say that environmental tobacco
10 smoke, sidestream smoke causes lung cancer. So I don't know
11 how it isn't relevant to this occurrence. I don't know how
12 it's prejudicial to them that it comes in. And I suspect
13 that the reason that you entered the motion in limine is that
14 I really didn't oppose it. I didn't plan -- and I
15 think -- although I don't know again and they have
16 transcripts. I think I said that before I went into it that
17 I would bring to your attention why I want to go into it.
18 It's going to come in in the case. I didn't mention it in my
19 opening statement. I didn't want to and I don't believe I
20 wanted to make this argument --

21 MR. CRIST: Bruce, what you, in fact, said was it
22 wasn't relevant. You did not intend to go into it.

23 MR. COOK: Well, it is relevant. It is relevant in
24 this case in many respects. Right now -- I mean -- and you

1 are just starting. Judge, for example, R.J. Reynolds Nabisco
2 with respect to the Northwest Airlines business, they really
3 went after them. They went after them on television. They
4 went after the ad agencies who published the -- who made the
5 ads for Northwest Airlines. It's going to come into this
6 case with respect to what their attitude is against people
7 who are trying to stop people from being infected by
8 cigarette smoke. The issue on the airlines, of course, is
9 environmental tobacco smoke.

10 Now, I don't know how it's prejudicial to you that
11 that comes in. That's -- I mean the jury doesn't live in a
12 vacuum. I'm sure they are aware of this issue.

13 THE COURT: Well, one of the questions that you
14 tendered on the questionnaire had to do, "Do you believe in
15 the restrictions?" And virtually everybody -- I think it was
16 a handful --

17 MR. COOK: I think there were three.

18 THE COURT: -- people who weren't in favor of the
19 restrictions. So --

20 MR. COOK: I think the best thing on the ETS is for
21 the Court to withdraw its order in limine on the issue
22 and --

23 MR. CRIST: I think if that's what is going to
24 happen, Mr. Cook ought to file a motion for reconsideration

1 and we ought to have a --

2 MR. COOK: I'm making one right now.

3 MR. GOOLD: Judge, if we want to beat the dioxin
4 record, I think we are off to a good start. A motion in
5 limine was granted on this. Mr. Cook withdrew any ETS claim
6 when he amended his complaints in this matter. He took that
7 out. All of this discovery --

8 MR. COOK: Mr. Goold, I don't have an ETS claim.

9 MR. GOOLD: Excuse me, Mr. Cook. May I be heard?
10 All the discovery in this case, all the trial preparation has
11 gone forward without their being ETS as an issue. If he
12 wants to now reverse it because it's essential arising out of
13 something about the airline's position on smoking
14 restrictions, that just shows how preposterous it is. We
15 couldn't be more prejudiced by him now injecting ETS a week,
16 how many days, into the trial after having withdrew that
17 claim, consented on the record to a motion in limine.

18 MR. COOK: I never had a claim on ETS. I never had
19 a claim --

20 THE COURT: There is no requirement that he file a
21 complaint on ETS. This isn't --

22 MR. COOK: It's a matter of evidence.

23 THE COURT: This is a common law lawsuit. I
24 granted -- I was concerned earlier when there was some

1 discussion about what the nature of the illness was and
2 was -- did Mr. Kueper have COPD. Because as you represented
3 to me, you guys had not spent any time in discovery trying to
4 prove or disprove that assertion. And this is a different
5 issue. There has been no question that you have had the
6 opportunity to discover the issue of smoking and lung cancer.
7 He is not making a new claim for a different disease. He is
8 introducing evidence of a separate kind of cause. Now, you
9 guys have mentioned Agent Orange and industrial exposure
10 and --

11 MR. COOK: Radon.

12 THE COURT: -- radon and pneumonia in youths. I
13 forgot the long word, histo --

14 MR. COOK: -- plasmosis.

15 THE COURT: -- plasmosis. I mean all of
16 these -- all of these separate causes have to be concerned by
17 the jury and it's got nothing to do with his pleadings. You
18 haven't pled those as separate affirmative defenses, have
19 you?

20 MR. MACDONALD: We filed notice of it in Rule 220.

21 MR. CRIST: Your Honor, the question is not whether
22 that's in our pleadings. The question is --

23 THE COURT: That's where I took off on his comment.
24 I should give the floor back to Mr. Goold then. Because I

1 disagreed with his statement that he has to plead ETS in his
2 complaint. You can get back to your point about other --

3 MR. GOOLD: Part -- one of the problems goes to the
4 frankly, Judge, a reversal of the motion in limine which
5 could not have been clear both by the Court and in terms of
6 Mr. Cook's position. For there now to be injected in this
7 issue midway through trial based on the proffer Mr. Cook has
8 made, the argument that he somehow he wants to get into ETS
9 because it has to do with airline smoking restrictions, what
10 does that have to do with Charles Kueper? Nothing. What
11 effect would it have on this trial if we have to go off into
12 the ETS --

13 THE COURT: We are discussing this --

14 MR. COOK: That is precisely the point. Mr. Crist
15 has come here and said, "We have got to redact all of these
16 exhibits. We have got to do this and that and the other
17 because they mention ETS." ETS is not a big deal in this
18 lawsuit. But it cannot be kept completely out. And you
19 don't have to defend ETS. I have not made a claim on ETS.
20 The Public Health Service has made a statement on ETS. I
21 don't plan on going into that. I suspect that my doctor is
22 going to go into that. But --

23 MR. CRIST: He is precluded by court order from
24 doing so.

1 MR. COOK: No. But, see -- I don't know what you
2 guys think motions in limine are.

3 MR. CRIST: I know what motions in limine are and I
4 know what orders are.

5 MR. COOK: And motions in limine -- and Judge
6 LeChien could not have made it any clearer is that people can
7 get relief from motions in limine. And until -- and to put
8 up with the harangue from you guys on a ridiculous point and
9 about making the trial last forever because ETS is coming
10 in -- Mr. Goold, we don't have time for this baloney. You
11 know, I mean ETS -- what is the reason ETS should be kept
12 out? I mean it's a fact of life. It's something that
13 involves this industry. And you are not prejudiced by it
14 coming in. They all know about it. What do you think in
15 Washington, Mr. Goold, that we don't have air out here?

16 MR. GOOLD: Mr. Cook, you are correct. We don't
17 have time for this. Judge, are we going to get off into who
18 was right or wrong on airline smoking bans? Are we going to
19 go off on what the problems were about the air quality in
20 airlines, whether it had to do --

21 MR. COOK: No. But we are going to get off on your
22 disciplining an airline for advertise -- I mean that's what
23 you do. That's why you are killing all of these kids, Goold,
24 while you are laughing.

1 MR. GOOLD: Mr. Cook --

2 MR. COOK: While you laughed long enough, one almost
3 died.

4 MR. GOOLD: You are more creative than anyone has
5 ever predicted you would be. But it's nonsense, Judge. You
6 cannot reverse field midway through trial.

7 MR. COOK: Judge, do I have to stay and listen to
8 this? I wish I --

9 THE COURT: Yes.

10 MR. COOK: Yes. You know, in Illinois a motion in
11 limine is not a final ruling ever.

12 THE COURT: I think the caution that you are
13 supposed to use motions in limine -- the reason for the
14 caution is that the minute you want to keep something out,
15 somebody else wants to put it in. So you have created a non-
16 issue in the case by having a battle over things that may not
17 ultimately be that important. That's the bad -- that's the
18 problem with motions in limine.

19 MR. CRIST: But the good news about motions in
20 limine are it identifies the issue -- issues and it limits
21 the issues and it limits evidence.

22 THE COURT: It does not limit issues. It keeps
23 prejudice out.

24 MR. CRIST: And it keeps prejudice out. That's

1 all --

2 THE COURT: This is not the substitute for a motion
3 for summary judgment.

4 MR. CRIST: I understand that. And this order was
5 granted by the Court and, in fact, it was even stipulated to
6 by Mr. Cook.

7 THE COURT: I know. I explaining the nature of the
8 beast, not what has occurred. I think the record is clear
9 that this was allowed and that my recollection is that he
10 consented to it.

11 MR. CRIST: He did.

12 THE COURT: Cook had consented to it. That's okay.
13 But this is not -- this is not tantamount to summary judgment
14 on the issue.

15 MR. COOK: I point out I still don't intend to go
16 into environmental smoke issues.

17 THE COURT: Would you mind if I ask what are talking
18 about this then for?

19 MR. COOK: Judge, it's because it comes in
20 tangentially on a lot of things that has very little to do
21 with anything. For example, I have told you right now that
22 my doctor is going to testify that one of the explanations
23 for the fact of the adenocarcinoma -- and the explanation for
24 there being a gap between smoking and not smoking is that it

1 has been established that environmental smoke causes people
2 to have cancer. Now, that is certainly relevant. That is
3 certainly germane. Therefore, I ask to be released for the
4 ETS. I assume that the order was entered because it didn't
5 have anything to do with anything. And now I have made a
6 proffer to the Court to show you that it has. And I think at
7 that point -- I think the whole thing is ridiculous, Judge.

8 MR. CRIST: Judge, this is three or four weeks away
9 from trial when we had this argument.

10 MR. COOK: Wait a minute. Don't you understand that
11 I am not bound nor is the Court bound.

12 MR. CRIST: You are bound by an order.

13 MR. COOK: No. Some way or another you two -- you
14 two --

15 THE COURT: Gentlemen.

16 MR. COOK: -- gentlemen misunderstand. Because I
17 don't feel like getting in a big, long harangue with you -- I
18 don't know if you were here for your motions in limine. But
19 most of them were ridiculous and aggravating and time
20 consuming. ETS is an issue that is so small in the scope of
21 this trial that when you argued it, I said, "Wait a minute,
22 Judge. I am not going to offer any evidence of ETS directly
23 and so I don't agree." But I said on every motion in limine
24 that I agreed to that I have the right to come and ask for

1 relief from it. I mean I have -- that is not a solemn
2 judicial admission on my part. It may come up for some
3 reason or another that Mr. Nester's insurance might become
4 relevant in this case. Our practice in Illinois is before
5 you go into an issue where there is a motion in limine, you
6 walk up to the Judge and you say, "Judge, I think that I am
7 now released from the motion in limine," or, "I ask for
8 relief from the motion -- order in limine for this particular
9 reason."

10 But what we are here on is because you said why
11 these exhibits have to be redacted because they mention ETS.
12 ETS has not been ruled on by this Judge to be not relevant to
13 this occurrence. I just agreed to your order. He didn't
14 rule on it. He ruled because I agreed because I didn't want
15 to argue with you like I am now on something that makes very,
16 very little difference in the big picture of things. I
17 certainly hope --

18 THE COURT: Motion in limine is a preliminary ruling
19 which the Court may change as the evidence in the trial is
20 fully developed, Eli versus National Supermarkets, 149
21 Ill.App.3d 186 -- 1986.

22 MR. GOOLD: Your Honor, I would submit to you that
23 nothing remotely approaching justification for changing the
24 ruling has surfaced this morning that could not have come up

1 in a more collateral way than through the airline issue.

2 THE COURT: What is your prejudice?

3 MR. GOOLD: Pardon me?

4 THE COURT: What is your prejudice?

5 MR. GOOLD: Because he will throw out a claim that
6 ETS is, as he likes to say, killing people that will sit
7 there on the record. We will have to respond to it.

8 MR. COOK: I'm not going to do that at all. See,
9 that's the point. I don't think -- you guys have
10 anticipated -- the only reason why I even bring this up at
11 this time is because Mr. Crist says that these documents that
12 he is so worried about because they might mention ETS -- I
13 didn't even read the ETS portion of them. Anything that -- I
14 pass them by because I don't want to argue about this. And
15 we get started arguing about this, Mr. Goold, not because I
16 am going to say that you are killing millions of people from
17 ETS, but because Mr. Crist wants to take that out of
18 documents where the reason for the issuance of the document
19 was ETS, but the reason for admission of the document was
20 retaliation, not ETS. My client does not suffer from ETS.
21 He got his the old fashioned way. I think, Mr. Goold, that
22 maybe perhaps you understand that. I don't intend to go into
23 the issue. It's going to come in tangentially on a lot of
24 things. My doctor is going to mention it.

1 MR. CRIST: Your Honor, our prejudice, in response
2 to your question, is the fact that there is a whole, entire
3 series of articles, medical literature that relates to ETS,
4 whole series of issues that are unrelated to the issues with
5 respect to the condition which Mr. Kueper alleges that he
6 suffers. It's an entirely different bank of literature.

7 MR. COOK: And I think that if I were to ask -- if I
8 were to say to this man, I would say, "Now, what is your
9 position on environmental tobacco and health?" that
10 regardless of what the Judge had ruled in limine that you
11 would make an objection on the basis of relevancy and the
12 Judge would probably say without even giving me chance to
13 walk up here, "That's sustained."

14 MR. CRIST: The question shouldn't even be asked,
15 Bruce.

16 MR. COOK: Okay. I'm not going to ask the question.
17 But if I had --

18 MR. CRIST: But now you have documents which, in
19 fact, deal with the substance of the issue.

20 MR. COOK: Okay. But they haven't been read to the
21 jury.

22 THE COURT: All right. Mr. Crist, you asked do you
23 redact it. Mr. Cook, you said -- I guess you intend --

24 MR. COOK: I want relief so I don't violate your

1 order in limine, Judge.

2 THE COURT: Are you going to get into something that
3 tends to show that there was, quote, retaliation, close
4 quote, because of somebody else's position on ETS much like
5 it was demonstrated in your Koop exhibit?

6 MR. CRIST: I think he is done with the issue.

7 MR. COOK: Yeah, I mean that's the point. I think
8 I'm done with the issue except as to my doctor. It may come
9 up tangentially like on the Koop thing. On the Koop thing I
10 never intended -- you can see the portion that I blew up. I
11 never intended to go into the newspaper article. The only
12 relevance of the Koop was the reprimand. The reason why I
13 agreed to the ETS thing is not that I don't think it's
14 germane. I just don't think it's going to come up very much.

15 THE COURT: Now, you on redirect, Mr. Crist, want to
16 place the entire document in less some redacted material? Is
17 that what you are anticipating?

18 MR. CRIST: Yes.

19 THE COURT: If you are going to try to admit the
20 entire document, it will be the entire document.

21 MR. CRIST: Well, the entire document is what is
22 admitted.

23 THE COURT: Well, I mean --

24 MR. CRIST: But there are parts that the Court said,

1 "We'll take care of that later," type issue. No. That was
2 the concern that we had at the time, your Honor.

3 MR. COOK: That's what all of this is about. I
4 think because of your concern that I ought to be relieved
5 from the ETS thing just so that I don't violate an order in
6 limine because it is tangential, but it may be -- there is no
7 reason to keep it out, Judge.

8 MR. CRIST: I think we had better go get lunch,
9 Judge.

10 THE COURT: Well, as long as you are talking about
11 the category of the reason why certain activities of the
12 Institute were undertaken, you can have relief from it for
13 that purpose. If you attempt to say that -- if you attempt
14 to turn that around and say, "You don't personally believe
15 environmental tobacco smoke is harmful, do you, sir?" or,
16 "You are ignoring all the proven list of things about
17 environmental tobacco smoke --"

18 MR. COOK: And that's exactly why I agreed to the
19 motion in limine. Because I thought that's really what it
20 was directed at, which I agree with that.

21 THE COURT: Well, I think we can take up -- I don't
22 think you can show prejudice about that limited use of the
23 information. It's no different than vending machines in that
24 sense.

1 MR. CRIST: I agree.

2 (Court recessed for lunch at 12:15 p.m. to reconvene
3 at 1:15 p.m.)

4 * * * * *

5 (The following proceedings were reported by
6 Maureen A. Schaefer, CSR, License #084-001650, RPR,
7 beginning at 1:25 p.m.)

8 (Court reconvened after the lunch hour. Before the
9 proceedings resumed, Plaintiff's Exhibit Number 61
10 was marked for identification.)

11 THE COURT: Mr. Cook, you may proceed.

12 MR. COOK: Thank you, Your Honor.

13 (The cross examination of Dr. Samuel D. Chilcote,
14 Jr., under Section 2-1102 of the Civil Practice Act
15 by Mr. Cook continued as follows.)

16 Q. Mr. Chilcote, I got just a few more things to go
17 through with you. I have found Plaintiff's Exhibit
18 Number 61--

19 (Mr. Cook showed the exhibit to counsel.)

20 Q. --and--

21 I'd move the admission of Plaintiff's Exhibit Number 61.

22 MR. CRIST: Is that based on a Tobacco Institute
23 document or something, Bruce? I just don't--

24 MR. COOK: It is. I received that document.

1 MR. CRIST: Okay.

2 THE COURT: What would you call that?

3 MR. COOK: Sixty-one, Your Honor.

4 MR. CRIST: It's a chart of the officers.

5 MR. COOK: It's a chart of the officers, and I
6 just--it's--other than going through it with Mr. Chilcote--

7 THE COURT: Sixty-one's identified, offered and
8 admitted.

9 (Plaintiff's Exhibit Number 61 was admitted into
10 evidence.)

11 MR. COOK: Okay.

12 Q. (By Mr. Cook) Mr. Chilcote, this morning I told you
13 that I had a--a little chart that shows your officers. And I
14 don't have another copy of it.

15 A. Okay.

16 Q. I can get one.

17 Do you want me to run out and get a small copy?

18 THE COURT: Anybody need a small copy?

19 MR. CRIST: Not right now, Your Honor.

20 THE COURT: All right.

21 Q. (By Mr. Cook) I'll go through with this--

22 A. You have to excuse me, sir. I can't read it from
23 here, but that's fine--

24 MR. COOK: May I be excused one second? I'm just

1 going to go right around the corner.

2 (Mr. Cook left the courtroom and subsequently
3 returned.)

4 MR. COOK: Sorry, Judge. It didn't help. The
5 reason it didn't help is it's right here (indicating.)

6 Q. (By Mr. Cook) Okay. I'm going to show you this
7 document and ask you to compare the left side of it to this
8 blow-up and--and--and--and see if it appears to be a copy
9 made from that document. They may not be the same year.

10 A. Okay. Yes, sir.

11 Q. Okay.

12 A. Let me look at the top.

13 Okay. Fine.

14 Q. Are they the same?

15 A. Yes, sir.

16 Q. Okay. Why don't you refer to that one and then I'll
17 show--

18 A. I don't think they're exactly the same, but I got
19 your drift, sir. Is that 1990?

20 Q. I don't know.

21 A. I notice some people--yes, sir.

22 Q. It is the same?

23 A. Yes, sir.

24 Q. Okay.

1 MR. COOK: And may I display, Your Honor,
2 Plaintiff's Exhibit Number 61 to the jury?

3 THE COURT: Yes.

4 (Mr. Cook placed the exhibit on an easel.)

5 Q. (By Mr. Cook) With respect to the Tobacco Institute
6 and--is this 1990, copy of your--

7 A. Yes, sir. 1990--well, I--yes, sir.

8 Q. Okay.

9 A. It would be 1990.

10 Q. The Board of Directors of the Tobacco Institute was
11 Jack Africk, David W. Burgh, K.v.R. Dey, Jr.--Dey or Dey?

12 A. Dey.

13 Q. --Dey, Theo W. Folz, W. Brooks George, David
14 Greenberg, T. J. Guinan?

15 A. Guinan.

16 Q. --Guinan, James W. Johnston, Charles Mullen,
17 Josiah S. Murray, M. B. Oglesby--that's B. Oglesby that we've
18 talked about before briefly?

19 A. Yes, sir.

20 Q. --Paul Randour, Frank Resnik, Tom Ryan, Arthur
21 Stevens, Andrew Tisch, James Wilson, and then the chairman at
22 that time of the Executive Committee was James Johnston from
23 R.J.R.; is that right?

24 A. Yes, sir.

1 Q. And the vice chairman at that time was M. B. Oglesby,
2 his--

3 A. Yes, sir.

4 Q. Okay. Now, the guys who have the stars by their
5 names, just one star, those are members of the--

6 A. --Executive Committee.

7 Q. --Executive Committee. The remainder of them who do
8 not have stars, like W. Brooks George--who is he?

9 A. Brook George had his own company in Virginia. He
10 died a couple years ago.

11 Q. Oh. Sorry.

12 A. No longer a member.

13 Q. Okay. And then the officers of the company in 1990,
14 it looks like those have changed somewhat--

15 A. Yes, sir.

16 Q. --because Miss Stuntz is not on there as a senior
17 vice president?

18 A. Yes. Miss Stuntz took over the position of Charles
19 Powers.

20 Q. How do you spell Miss Stuntz's name?

21 A. S-T-U-N-T-Z.

22 Q. That's what I thought. She took over--Powers--we'll
23 put a line through him. Does he still work for you?

24 A. No, sir.

1 Q. And then you had a--a number of vice presidents:
2 Boman, Cannell, Dawson, Dyer, Eagan, Jacobson, Merryman,
3 Menshew, Morgan, Morris, Nelson, O'Connor, Panzer,
4 Stuntz--oops, there she is. She's--

5 A. Then she got a promotion.

6 Q. Looks like she did well. --Trisler, Vinovich, White,
7 and then Steele is your Treasurer. Is he still your
8 Treasurer?

9 A. Yes.

10 Q. Okay. And Donna Hilderley?

11 A. Yes.

12 Q. And Henry Long, Assistant Treasurer?

13 A. I'm not sure.

14 Q. Okay. On your vice presidents, have any of these
15 people terminated or--

16 A. Yes, sir. Stanley Boman resigned from the Institute
17 a year or so ago. Bill Cannell resigned from the Institute.
18 Dennis Dyer--Would you like explanations of why they--

19 Q. No. I don't care.

20 A. --got other jobs, better jobs?

21 Q. No. I'm just trying to find out--

22 A. Sure.

23 Q. --who's around--

24 A. Terry Eagan resigned. George Menshew died.

1 Q. I'll give him a double line.

2 A. Dick Morgan retired. Ron Morris is now in--in
3 Washington, promotion. Fred Panzer retired. Susan, we
4 explained. Bill Trisler--no. He's still with us.

5 Q. Mr. White's there?

6 A. Yes. I should point out, Mr. Cook, that Mr. Steele
7 and Mr. Long are--are not directly employees of the
8 Institute. They are the head of--of committees.

9 MR. HEPLER: Can't hear the witness.

10 Q. (By Mr. Cook) They're what?

11 A. They--they are--operate in a capacity of being with a
12 company. Their full-time job is with a company rather--they
13 are not full-time employees of the Tobacco Institute.

14 Q. What is the full-time company they work for?

15 A. Well, they're with a member company.

16 Q. Which member company?

17 A. Harry Steele would be Philip Morris.

18 Q. Okay. And--and the other one?

19 A. Mr. Long, I'm not sure.

20 Q. Now, what did Fred Panzer do when he was with the
21 Tobacco Institute?

22 A. Mr. Cook, I'm not sure of all of his jobs. When I
23 first joined the Institute, he was in the Federal Relations
24 Division and then he was transferred over to the Public

1 Affairs Division. When he retired, he was in Public Affairs.

2 Q. I'm going to hand you what's been marked--Have I
3 shown this to everybody?

4 (Mr. Cook showed an exhibit to counsel.)

5 A. Mr. Cook, I--I noticed another--Dan Milway retired,
6 also, sir. Administration was replaced by Bill Adams.

7 Q. (By Mr. Cook) I'm going to hand you what's been marked
8 Plaintiff's Exhibit Number 8 and ask you if you'd--

9 (The witness handed a document to Mr. Cook.)

10 MR. COOK: Thank you, sir.

11 Q. --and ask you if you'd look at that document, sir.
12 You've seen that before?

13 A. No, sir.

14 Q. Okay. It appears to be, does it not, a letter to
15 Horace Kornegay from--from Mr. Fred Panzer?

16 A. Yes, sir, in 1972.

17 Q. 1972. That's the same Fred--or at least that would
18 seem to be the same Fred Panzer we've just been talking about
19 who just retired?

20 A. Yes, sir.

21 Q. When did--did he retire recently?

22 A. I think it was a year or two ago.

23 Q. Okay. And if you look on the back page, you'll see
24 who was copied in on the letter.

1 A. Yes, sir.

2 Q. And that's Mr. Kastlebaum?

3 A. Mr. Kastenbaum and Mr. Kloefer.

4 Q. And Mr. Kastenbaum was the statistician?

5 A. Yes, sir.

6 Q. And what?--that's a guy that works with mathematics?

7 A. Yes, sir.

8 Q. And Mr. Kloefer would have probably been
9 Mr. Panzer's boss?

10 A. At this time, I don't know, sir--

11 Q. Mr.--

12 A. --because--I doubt it. I doubt it. He probably was
13 in the Federal Relations Division at that time.

14 Q. Panzer was probably in the Federal Relations Division
15 and we know that Kloefer was in Public Affairs?

16 A. Yes, sir.

17 Q. Okay.

18 MR. COOK: I'd move the admission of Plaintiff's
19 Exhibit Number 8.

20 MR. MACDONALD: We'd object, Your Honor, to
21 relevance and hearsay.

22 MR. CRIST: Same objections, Your Honor; also to
23 materiality and hearsay.

24 MR. MACDONALD: Join in materiality, Your Honor.

1 THE COURT: It's overruled. You'll be given an
2 opportunity to make additional comments regarding what
3 portions are published to the jury.

4 MR. COOK: Your Honor, the only portion that I am
5 going to publish to the jury is the first page, and I have
6 edited some of the stuff that is extraneous to--to this--

7 THE COURT: Have you seen the--

8 MR. COOK: They've seen the--

9 MR. CRIST: Yeah, I kind of got a side glance of it.
10 Yeah.

11 THE COURT: I'm sorry. What did you edit out?

12 MR. COOK: Well, I took this off (indicating)--

13 THE COURT: Yeah.

14 MR. COOK: --and I took that off (indicating).

15 THE COURT: Okay.

16 MR. COOK: And then other than that--well, it looks
17 like she cleaned some handwriting off up there, too
18 (indicating).

19 THE COURT: Okay.

20 MR. COOK: Okay. It looks like she took off an
21 initial up there, also (showing the document to counsel).
22 Okay. May I publish it to the jury, Your Honor?

23 THE COURT: Yes.

24 Q. (By Mr. Cook) Now, this is a--a four-page document,

1 sir. I want you to go through the--the first page of it with
2 me and the jury. I want to read to you--the subject matter
3 of the memoranda is "The Roper Proposal." Have you ever
4 heard of the Roper Proposal?

5 A. No, sir.

6 Q. Do you know what Roper is, with connection to
7 tobacco?

8 A. No, sir.

9 Q. Okay. The date of it is May the 1st, 1972 and the
10 comments appear to be, "General Comments, It's my strong
11 belief that we now have an opportunity to take the initiative
12 in the cigarette controversy and start to turn it around.
13 For nearly twenty years, this industry has employed a single
14 strategy to defend itself on three major fronts--litigation,
15 politics, and public opinion. While the strategy was
16 brilliantly conceived and executed over the years helping us
17 win important battles, it is only fair to say that it is not,
18 nor was it intended to be a vehicle for victory. On the
19 contrary, it has always been a holding strategy, consisting
20 of creating doubt about the health charge without actually
21 denying it"--that's what you do right now; isn't it?

22 MR. CRIST: Your Honor, I object, asking this
23 witness about a document that pre-dates his employment with
24 the Tobacco Institute by nine years and asking him to somehow

1 endorse it.

2 MR. MACDONALD: We'd join in that, Your Honor.

3 THE COURT: The question was separate from
4 whether--the document itself. So you may proceed.

5 Q. (By Mr. Cook) That's what you do right now; you create
6 doubt about the health charge without actually denying it;
7 right?

8 A. No, sir. We attempt to provide the other side, as
9 I've stated.

10 Q. Well, sir--

11 A. The industry has their position. I'm an advocate for
12 their position, sir.

13 Q. I understand that, but, I mean, is there any other
14 reason, sir--I mean, it's somebody--some health authorities
15 say that something's unhealthy and then you say that--that
16 their position is a canard, a hoax? I mean, isn't that to
17 stop people from believing that the position of the health
18 authorities is--should not be relied on, that they--that
19 people should doubt it?

20 MR. CRIST: Your Honor, objection. He's now
21 attributing, again, statements that were--refer to other
22 documents that pre-date this witness' employment by ten years
23 and attributing it to this witness.

24 MR. MACDONALD: Your Honor, I also have another

1 objection under the First Amendment to the right to speak out
2 on subjects of public importance.

3 THE COURT: Overruled.

4 A. Mr. Cook, as I told you, it's not the language that I
5 would use. I--I think that we're entitled to state our
6 position, sir. Now, if someone--

7 Q. (By Mr. Cook) You and I have been through this before,
8 sir, and I told you I know that you have a right to state
9 your position, and you could say--you could go out and say
10 today, if you feel like it, that cigarette smoking does not
11 cause cancer; you could go out and say that, and you want to
12 know something? You're an American citizen; you have a right
13 to say that; whether it's right or wrong, you have a right to
14 say it.

15 MR. MACDONALD: Your Honor, I object to--I object to
16 his statements about what the law is, instructing the witness
17 as to his recollection of the Constitution of the United
18 States. That's for the court to determine and instruct the
19 jury.

20 THE COURT: Mr. Chilcote, please, again, listen to
21 the question and then we won't need these explanations.

22 Q. (By Mr. Cook) Mr. Chilcote, now, if--if--if this
23 gentleman sitting behind Mr. Merryman back there--if he comes
24 in here and he says, "It's raining outside"--you don't know

1 him; do you? Nice-looking man.

2 MR. TERRY BROWN: Thank you.

3 Q. (By Mr. Cook) If--

4 MR. TERRY BROWN: First time I've ever heard that.

5 MR. HEPLER: It's sort of a matter of opinion, Your
6 Honor.

7 MR. TERRY BROWN: Thank you.

8 Q. (By Mr. Cook) I mean, if he said it was raining
9 outside, you wouldn't have any reason to disbelieve him;
10 would you?

11 A. No, sir.

12 Q. All right. Now, if the lady who's sitting right
13 beside him came in and said, "It is not raining," what would
14 you think?

15 A. Well, I've seen it happen with weathermen all the
16 time. If you don't like the weather, wait for it to change,
17 five minutes. No. Seriously, I don't know. I'd want to
18 find out for myself, I guess.

19 Q. Okay.

20 A. Go outside and look around.

21 Q. Yeah. Well, the point is, of course, is that on
22 smoking and cigarettes, people can't do that; can they? I
23 mean, when--when an adult or a child makes a decision to
24 smoke a cigarette, he has to base it on information that's

1 provided to him by other people?

2 A. That's correct.

3 Q. Okay. And--and all of the health authorities, at
4 least the institutions, have--have all said that cigarette
5 smoking causes cancer and then the Tobacco Institute and the
6 tobacco companies have said it's not proven that it causes
7 cancer; that's to create a doubt; isn't it?

8 MR. CRIST: Your Honor, I object to that. That's
9 preempted, specifically dealt with in para--in the court's
10 order in limine.

11 THE COURT: Overruled.

12 Q. (By Mr. Cook) I--I--I don't understand--

13 A. Mr. Cook, in--in addition to the companies that
14 you've outlined--you've done it very well--I have heard--

15 Q. Sir--

16 A. --in Congress other--

17 Q. Did I ask you that?

18 A. --members--

19 Q. Please, sir.

20 A. You asked me--

21 Q. Please. I'm trying to--

22 A. You've asked me--

23 THE COURT: One at a time, gentlemen.

24 Q. (By Mr. Cook) I didn't ask you if you've heard

1 anybody else. I asked you, sir, what the purpose is of
2 saying--you have--you have all these health agencies saying
3 cigarette smoking causes cancer; right?

4 A. That's correct.

5 Q. Right. Okay. And then you have--you have other
6 people, including the Tobacco Institute, saying that's not
7 proved; right?

8 A. It's an unanswered question.

9 Q. Okay. Now, why are you saying that?

10 A. Because, as I've said yesterday, I don't think anyone
11 knows the cause of cancer.

12 Q. That's right, but it's to cause the people who are
13 smoking cigarettes not to believe the people who are saying
14 they're causing cancer; right?

15 MR. CRIST: Your Honor, again, a preemption
16 objection.

17 THE COURT: Overruled.

18 MR. CRIST: Can I have an objection, Your Honor, to
19 this entire line of questioning on this area?

20 THE COURT: Yes, sir.

21 MR. MACDONALD: We join, Your Honor.

22 MR. NESTER: We join, Your Honor.

23 Q. (By Mr. Cook) Mr. Chilcote, don't you understand
24 what--I understand that you think you have a legitimate point

1 of view, but, I mean, you read through all these documents
2 and they continue to say, is that, "We want our point of view
3 known"; right? You know--

4 A. That's correct.

5 Q. Okay. And the reason that you want your point of
6 view, is that you want potential customers to know both sides
7 of the issue; right?

8 A. That is correct.

9 Q. Okay. And--and so that's so they won't necessarily
10 believe what the health authorities say; you don't want them
11 to necessarily believe it because you don't believe what they
12 say is true?

13 A. I would hope that the individual would take the
14 information and make his own decision.

15 Q. How--how can--how--how can--how--how can children do
16 that?

17 A. Well--

18 Q. Who do they believe: you or them?

19 MR. CRIST: Object. This is much more directly,
20 Your Honor. It's clearly in violation of the order.

21 THE COURT: I--I don't know what you're talking
22 about. Necessarily we've restricted some comments before the
23 jury, so step up here and we'll talk about it a little bit.

24 MR. CRIST: Your Honor, very specifically

1 Paragraph A (indicating).

2 THE COURT: No. The objection's overruled. Yeah.
3 It's because it's obvious.

4 MR. HEPLER: No. No. Okay.

5 Q. (By Mr. Cook) You know, the Surgeon General's report
6 came out in 1964 saying--as you know now because I had you
7 read it to the jury, saying cigarette--it had been proven
8 that cigarette smoking--you said "casually"--it was--is
9 causally related to cancer in men? That's what it said in
10 1964; right?

11 A. I'm not sure. I think it said "caused." I don't
12 think it said "proved."

13 Q. Let's read it again then. Read the paragraph again
14 just so we all know.

15 MR. MACDONALD: What page you on, Mr. Cook?

16 THE WITNESS: Thirty-seven.

17 MR. COOK: Thirty-seven.

18 A. Which--on lung cancer, sir?

19 Q. (By Mr. Cook) Yes, sir.

20 A. Yes, sir. "Cigarette smoking is the causal related
21 to lung cancer in men; the magnitude of the effect of
22 cigarette smoking far outweighs all other factors. The data
23 for women, though less extensive, point in the same
24 direction." Sir, I don't see "proved" here; do you?

1 Q. I don't see that it says what you said. Let me read
2 it to you and you see whether I'm right. "Cigarette smoking
3 is causally related to lung cancer in men." Isn't that what
4 that says?

5 A. Yes, sir.

6 Q. Do you know what "causally" means, sir?

7 A. Well, I thought I did. It causes--

8 Q. It means it causes it?

9 A. Well, I think--well, my--my interpretation is, is
10 cause and prove are not the same, sir.

11 Q. Okay.

12 A. I--I would like to know the mechanism. I'd like to
13 know if it is--if--

14 Q. Then why don't you go ask somebody?

15 A. --if it's replicated in any--in human tissue, what is
16 the mechanism.

17 Q. No. No.

18 MR. CRIST: Your Honor, I move to strike Mr. Cook's
19 comments.

20 Q. (By Mr. Cook) It's replicated in that man right
21 there, sitting there. See him? See him?

22 MR. CRIST: Your Honor, I move to strike this.

23 MR. MACDONALD: I object and move to strike it. If
24 he wants to know what causality is, let him look at the

1 document where it defines what it is.

2 THE COURT: I think we did this one time yesterday
3 where the witness asked a question to Mr. Cook and Mr. Cook
4 responded. I'm going to ask you not to ask questions of
5 Mr. Cook--

6 THE WITNESS: I'm sorry, Your Honor.

7 THE COURT: --and, Mr. Cook, don't respond to any
8 questions that he may pose to you. Other than that, the
9 objection's overruled. And any comments by Mr. Cook are
10 stricken. The question by the witness is stricken. You're
11 asked--you're--you're ordered to disregard the comments and
12 the question proposed by the witness.

13 MR. COOK: All right. How about the comment by
14 Mr. MacDonald, also?

15 THE COURT: I--I'll include that, as well, anything
16 flowing from it, except the fact that he made the motion to
17 strike, which is allowed.

18 Q. (By Mr. Cook) The--in 1964, the Surgeon General said
19 that cigarette smoking was causally--lung cancer was causally
20 related to cigarette smoking; right?

21 A. Yes, sir.

22 Q. And--and that's what you think that--what's not
23 proved; right?

24 A. That's correct.

1 Q. Okay.

2 A. I do--I don't know--I don't know, sir.

3 Q. Okay. I mean, that's all I've said to you. Now,
4 the--the Surgeon General said that. Now, you folks go around
5 and respond to that and say that the Surgeon General's
6 statement isn't necessarily true; right?

7 A. We disagree, yes, sir.

8 Q. Okay. So then I'm right. And--and--and so if you
9 were a person that smoked then, you wouldn't necessarily
10 believe the Surgeon General; right?

11 A. I don't know who I would believe. I would suspect
12 that more people would believe the Surgeon General than the
13 Tobacco Institute.

14 Q. I would certainly hope so. The--

15 A. And I think that's the reason there's a high--

16 Q. The point that I'm trying--I'm trying to make to you,
17 sir, without getting into this too much, the reason why you
18 people go around and have published all this stuff telling
19 people the relationship is not proved is to inform the public
20 that it's not proved so they don't necessarily believe the
21 Surgeon General; right? Now, listen to the question. It is
22 so they don't necessarily, N-E-S-S, believe the Surgeon
23 General?

24 MR. MACDONALD: Your Honor, he's asked--I object.

1 He's asked the witness five times and--and Mr. Chilcote has
2 told him what his understanding is and what the position is
3 and why they advocate the position. The fact that Mr. Cook
4 doesn't like it is too bad.

5 THE COURT: Well, then why don't you instruct him to
6 answer the question, or ask me to? Have a seat. Your
7 objection's overruled.

8 Q. (By Mr. Cook) Mr. Chilcote, I'm not trying to be
9 difficult with you. You don't want people--now, you do not
10 want people to believe that what the Surgeon General says is
11 absolutely true; right?

12 A. I think people have to form their own opinions, sir.
13 We've said--

14 Q. Did I ask you if I thought people had to form their
15 own opinions? I'm asking you if you, the Tobacco
16 Institute--do you want people to believe what the Surgeon
17 General says?

18 A. I want them--we state our position and--

19 Q. Do you want them to believe what the Surgeon General
20 says? Can't you understand me, sir? You get paid well; you
21 ought to be able to understand English. Do you want people
22 to believe what the Surgeon General says is true?

23 MR. CRIST: Your Honor, I object. I'd like the
24 witness to be able to finish--to be able to answer the

1 question.

2 THE COURT: Your objection's overruled.

3 Do you have an objection, as well?

4 MR. MACDONALD: Yes, sir, I do. I object to the
5 form of the question. I think he's answered it. It's
6 argumentative.

7 THE COURT: He has not answered it. That's why
8 we're doing this. All right? When we have an answer, we'll
9 move onto something else.

10 Q. (By Mr. Cook) I'll try again. Now, if--if you deny
11 publicly that something that somebody says is true--they say,
12 "This is true" and you say, as I said yesterday, "It ain't
13 necessarily so," the only reason that you would do that is,
14 is because you don't want to believe them that it's
15 absolutely true; isn't that correct, sir?

16 A. No, sir. We've said that there are risks associated
17 with the product.

18 Q. I know that you said that. I've been here all the
19 time. What I'm asking you, sir, there--there--that there
20 are--there are risks associated with the product. Now, we
21 know--

22 A. Yes, sir.

23 Q. --one thing--of course, you don't know what they are?

24 A. We know that it's been associated with--with cancer,

1 sir.

2 Q. How strong is the association, sir?

3 A. I've heard from five to ten percent of the people
4 that have smoked have lung cancer.

5 Q. They're going--that they're going to get it; huh?

6 A. No. That this is the--the studies that I've heard,
7 sir.

8 Q. Do you think that's true or not?

9 A. I have no reason to doubt it, no, sir.

10 Q. Okay. So--so then you would want the public to know
11 that people who smoke get lung cancer?

12 A. Yes, sir. We've said that there's an increased risk.

13 Q. Okay. Do you know of any publication by the Tobacco
14 Institute that says that people--well, let me ask you this.
15 Okay. You said there's an increased risk of getting lung
16 cancer; right?

17 A. Yes, sir. Five--yes, sir.

18 Q. And you've published this nice little pamphlet to go
19 out to children, telling them to obey the law; is that right?

20 A. And not to smoke, sir.

21 Q. Yes, sir. And do you tell them, sir, that if they
22 do, they may get lung cancer?

23 MR. MACDONALD: Your Honor, I object to the
24 question. He has asked that very question at least three

1 times over the last two days, and I object to that.

2 MR. COOK: The reason I'm asking is I'm trying to
3 get on the--back to the original question about what they
4 want by this, Judge.

5 THE COURT: All right. The objection--

6 MR. COOK: I'm about ready to quit.

7 THE COURT: The objection is sustained. It has been
8 covered in previous testimony.

9 MR. COOK: Okay.

10 Q. (By Mr. Cook) Now, I--I want to go back to--to--I was
11 trying to get you into a position, you see, to talk about the
12 brilliantly conceived strategy.

13 A. Mr. Cook, I know of no strategy.

14 Q. No. But this document knows about it; doesn't it
15 (indicating)?

16 MR. CRIST: Your Honor, I object to counsel's
17 comments. He can ask a question; that's fine, but he's
18 commenting. He's arguing.

19 MR. COOK: I was referring to the document and
20 pointing to the line.

21 THE COURT: The objection's overruled.

22 A. Mr. Cook--

23 Q. (By Mr. Cook) I don't have a question before you, sir.

24 MR. CRIST: Your Honor, that's precisely my point.

1 I move that Mr. Cook's comments be stricken.

2 THE COURT: Excuse me. There were three people at
3 one time talking.

4 MR. CRIST: Your Honor, the question ought to be
5 phrased in terms of a question rather than Mr. Cook's
6 comments, and I object because he hadn't asked a question.

7 THE COURT: Hey, I agree. Let's let him ask a
8 question. We can go no further with objections until there
9 is a question.

10 MR. COOK: I didn't ask a question.

11 MR. MACDONALD: Can we move that his comments about
12 whether the document knows anything be stricken?

13 THE COURT: It's overruled. I've already ruled on
14 that objection.

15 Q. (By Mr. Cook) Why--no, I'm not going to ask you why.
16 Isn't it true that the only reason that you would tell people
17 that the Surgeon General's materials, that these figures are
18 invented, that they're a hoax, that they're a canard, that
19 they're all of these things, that this has not been proven
20 would be to cause people not to necessarily believe the
21 public health anti-smoking warnings?

22 A. Are you referring to this document, sir?

23 Q. Sir, no. I'm referring to the fact--now, I--if
24 you--if--maybe you could stick with me here. These--these

1 companies--I mean, not these companies--these agencies:
2 American Cancer Association, the American Lung Association,
3 the National Institute of Health, the Department of Health
4 and Human Services, the American Heart--I don't know that
5 they're involved with cancer--but these--these people all say
6 that it is causally--that there's a causal connection between
7 smoking and cancer. The Tobacco Institute, on behalf of its
8 industry, goes around and publishes documents like
9 Plaintiff's Exhibit Number 41--

10 (Mr. Cook placed a chart on the easel.)

11 Q. --that says things like this, "Deceptive Propaganda,
12 Have you heard these canards? Three hundred thousand people
13 a year die each year because they smoked." Now, I don't know
14 if that's true. You don't know if that's true. Neither one
15 of us know it's true. The only thing we know, that you and I
16 know, is that little blue book in front of you says more than
17 340,000; right?

18 A. Yes, sir, in the industry--

19 Q. No. Wait a minute. No--no.

20 A. Okay.

21 Q. No. That's right; isn't it?

22 A. Yes, sir.

23 Q. That this little blue book published by the United
24 States Government on smoking and health that Joe Califano,

1 the Secretary of Health, Education and Welfare, said--I think
2 we said what?--346,000 deaths annually from smoking? Now,
3 the response of your industry is to say that, "This is a
4 hoax." Now, the only reason that you do that is that so
5 people won't believe this, right, (indicating), necessarily
6 believe it? I mean, you invite them--I under--is that "We
7 say that there're risks and if they want to believe it, they
8 can, but at the same time, we want them to know that it may
9 not be true"; right?

10 A. The industry's also said that it may cause cancer.

11 Q. Yeah. And where did the industry say that?

12 A. I think I've said it today. I think I've said it
13 yesterday. We have said that it may cause cancer.

14 Q. I've got a whole bunch of your publications here.
15 Have you ever seen anything that you published that says it
16 may cause cancer?

17 A. We've said that there is increased risk.

18 Q. Wait a minute now, sir. I didn't ask you about
19 increased risk.

20 A. I don't--

21 Q. You just got through saying, is that the industry
22 says that it may cause cancer. Now, I've asked you, sir,
23 who, when and where has ever admitted that in your industry,
24 that it's been published, is that these risks are there and

1 if you smoke, you may get cancer?

2 MR. CRIST: Your Honor, I object. Preemption
3 ground, once again.

4 THE COURT: Overruled.

5 Q. (By Mr. Cook) See, I mean, this all has to do,
6 Mr. Chilcote, with why you do this, and I don't know why you
7 can't say this to me, "Mr. Cook, we do this because we don't
8 believe this figure and we don't want our customers believing
9 this figure because we don't think it's been proven"; that's
10 really the truth; isn't it? I mean, it's easy to say.
11 There's no other reason to do it; is there?

12 MR. MACDONALD: Your Honor, I object to the form of
13 the question insofar as he has asked about three questions in
14 there and I think it's unfair and improper.

15 MR. COOK: I think he's right, Your Honor. I'll
16 withdraw the question.

17 Q. (By Mr. Cook) Mr. Chilcote, do you understand what I'm
18 asking you at all about this, sir?

19 A. Well, I--I thought I understood. I think that I've
20 been responsive. I've told you the industry's position, sir.

21 Q. I understand what your industry's position is, sir.
22 What I'm asking you is, is what is the reason you communicate
23 it?

24 A. I have said over--I think that the industry's

1 entitled to communicate their position, sir.

2 Q. And I've said to you, sir, that I agree that
3 the--that--that--you know, we've been through this and the
4 judge has asked me not to do it--I know that you have a right
5 to communicate your position. I know that. Everything so
6 far--now, we're going 1-2. We're right down the line--

7 MR. CRIST: Your Honor, I object.

8 Q. --but the question is--

9 THE COURT: Overruled.

10 MR. CRIST: The court had asked him not to do it I
11 think is a pretty good suggestion that he knows he shouldn't
12 be doing it.

13 THE COURT: Overruled. I understand
14 what--what's--what Mr. Cook's question was, and it wasn't
15 that I had instructed him not to ask that question.

16 MR. MACDONALD: Your Honor, I have a different
17 objection. It's--it's asked--he asked him what the reason
18 was. He told him the reason. He's told him that four times.
19 What the reason is, he's told him the reason. It think it's
20 repetitive and I think he has fairly answered the question.

21 MR. COOK: I--

22 THE COURT: The objection's overruled.

23 Q. (By Mr. Cook) Now, we've gone 1-2; now here's 3--and
24 if you'll just say that "It's so people know that what the

1 Surgeon General says is not necessarily so, that's why we
2 tell them this"?

3 A. We have a right to disagree, sir. We have a right to
4 state our position. That's not the only reason.

5 Q. I know you do. What--what is--

6 A. If the Surgeon General, sir, made a statement against
7 the industry that the industry didn't believe in, wouldn't we
8 have a right to present the other--as long as it's well
9 founded--

10 Q. Haven't I told you that I agree you have a right?

11 A. That doesn't sound--

12 Q. No. No. You don't understand. You don't want to
13 admit the truth. The truth is, sir, that what you have is a
14 brilliantly conceived strategy to create doubt about the
15 health charge without denying it?

16 MR. MACDONALD: Your Honor--

17 Q. (By Mr. Cook) It's good. You've done well.

18 MR. MACDONALD: I object to his question. I object
19 to the characterization. He asked him the reason. He gave
20 him a reason. He's told him that four times, what the reason
21 is, because they had a right to advocate that position. That
22 is the reason that he's testified to. I think it's improper
23 for him to keep asking him and arguing with him to get him to
24 say something he wants. So I object.

1 THE COURT: He doesn't have to agree with the
2 question. He can say, "No, it's not true" or he can say,
3 "Yes, it is true."

4 MR. MACDONALD: He said three questions ago--

5 THE COURT: He has not--

6 MR. MACDONALD: --"No, sir." He gave the position.

7 THE COURT: All right. I--I understand. We will be
8 here until this question is answered. All right? You may
9 proceed. Your objections are overruled.

10 MR. CRIST: The same objection, Your Honor.

11 Q. (By Mr. Cook) Mr.--somewhere in there, Mr. Chilcote--I
12 mean, you're a smart man--that we're not communicating, and I
13 don't know what it is. It's either because you've decided
14 that you can't do it, or I'm not making myself clear to you,
15 one of the two, so I'm going to try and make myself perfectly
16 clear. Mr. Chilcote, if somebody comes out and makes a
17 positive statement and--about anything and you take public
18 issue with it, it's because you want people to know you don't
19 agree with it; right?

20 A. Yes, sir.

21 Q. Okay. So--so when the Surgeon General--when the
22 American Cancer Institute--I mean the National Cancer
23 Institute, the American Lung Association, American Medical
24 Society--when they come out with all these things about

1 smoking and cancer, you have gone out and told people that
2 it's not true, it's a hoax?

3 A. That's correct.

4 Q. Okay. And the reason that you told them that it was
5 a hoax--this is the question now--the reason you tell people
6 it is a hoax, is that you don't want people to believe it's
7 the truth; right?

8 A. We say that we--I think other--if we disagree with
9 it, we have a right to disagree, sir.

10 Q. Do you understand, sir, that--that--that we all agree
11 with you on that--

12 A. All right.

13 Q. --is that--you know, this is--

14 A. All right.

15 Q. We're Veterans, you and I. We--we agree with this
16 stuff. The point is--and I don't--I must not be getting
17 through to you. What I want to know is what the motive is to
18 tell people the other side. It can only be, sir, that you
19 don't want them to believe the other side is true.

20 A. The--the motive, sir, is so that they have the
21 information, they can make the decision.

22 Q. The motive is because you don't want your customers
23 to believe they're going to die from smoking cigarettes;
24 that's the motive; isn't it?

1 A. No, sir. No, sir.

2 Q. Do you want them to believe that they're going to die
3 from smoking cigarettes?

4 A. We've told people that there's a risk involved in it.

5 Q. Now, sir--

6 A. And it's--

7 Q. Where did you tell them--come on, tell the jury,
8 "We've told people," who told people, when--

9 A. I think on every document--

10 MR. CRIST: Your Honor, I object. This very clearly
11 is preempted.

12 MR. MACDONALD: It's also repetitive, Your Honor.

13 THE COURT: Mr. Cook, would you approach the bench,
14 please--

15 MR. COOK: Sure.

16 THE COURT: --and other counsel.

17 (A bench conference was held, out of the hearing of
18 the jury.)

19 THE COURT: Your question necessarily would have as
20 its response something to do with warnings, as it's presently
21 worded.

22 MR. COOK: Oh. Okay.

23 THE COURT: And since you've taken it--you've taken
24 it and forced him to have to respond about the warnings and

1 the adequacy in current state of the art, so to speak, it
2 would violate--I would sustain the objection to the--I wanted
3 you to know why I was doing it.

4 MR. CRIST: Your Honor, I would ask the jury be
5 instructed since--since July of 1969 there have been warnings
6 on the packages, which has been adequate--

7 THE COURT: We had--there's no direct reference to
8 it. You've headed it off successfully, so there's no need to
9 do that.

10 MR. COOK: Your Honor, he's the one who says, you
11 know, that, "We've done this." Then I'll just ask him what.

12 MR. CRIST: We have not headed it off. The
13 question's been asked.

14 THE COURT: Yeah.

15 MR. CRIST: The prejudice has been done. I think
16 the jury ought to be instructed that the warning is adequate
17 to communicate the relationship between smoking and lung
18 cancer or any other connection since July of 1969.

19 THE COURT: It isn't that the--the question wasn't
20 so specific as to directly raise that since the witness
21 himself has gotten off into tangents about other efforts to
22 educate with children, et cetera, so this isn't--it isn't so
23 specific as to--to bring up any area that brings into
24 question the adequacy of any of the warnings.

1 (The bench conference ended.)

2 THE COURT: The objection's overruled.

3 MR. CRIST: Your Honor--

4 THE COURT: That objection's overruled. The first
5 objection's sustained.

6 Q. (By Mr. Cook) Mr. Chilcote, if somebody said something
7 that you disagreed with and you didn't want somebody else to
8 believe it, what would you do?

9 A. I would try and convince them, sir, the other--

10 Q. You--you'd try and convince the audience--

11 A. Let them--

12 Q. --that the other person wasn't right?

13 A. I would try and--yes, I'd try and present my facts,
14 my side.

15 Q. That--see, Mr. Chilcote, this isn't very hard.

16 That--that the reason why you attack--not you, but the
17 tobacco industry attacked this--the--the facts surrounding
18 the cigarette controversy is, is that they didn't want people
19 to necessarily believe that the public health agencies and
20 the volunteer health organizations--they didn't want the
21 audience to believe that they necessarily were true?

22 That's--that's really a very easy question. I mean, there's
23 no other reason to tell people other than they don't--that
24 you didn't want them to accept this as gospel; is there?

1 A. No, I don't think they ought to accept that as
2 gospel, sir. We don't agree.

3 Q. That's the point. Now, they shouldn't accept it as
4 gospel and all this--this whole hour that we've been here is
5 because I've been trying to get you to say, "The reason that
6 we did this is that we didn't want our customers to believe
7 necessarily, necessarily that the Surgeon General was right
8 because we didn't believe it and we didn't want our customers
9 to believe it"?

10 A. That's correct.

11 Q. Okay.

12 A. Yes, sir.

13 Q. That's all this was about. And you don't believe it
14 today as to what the Surgeon General says; do you?

15 A. I believe that there're risks associated with the
16 product, yes, sir.

17 Q. Oh.

18 A. But I choose to--to smoke.

19 (Mr. Cook put a chart on the easel.)

20 Q. The second part of the strategy he's discussing that
21 was brilliantly conceived was advocating the public's right
22 to smoke without actually urging them to take it up--take up
23 the practice. That--that's true today; is it not?

24 A. Yes, sir.

1 Q. That's what the Tobacco Institute does. This one's
2 true (indicating); this one's true (indicating), and
3 "encouraging objective scientific research as the only way to
4 resolve the question of health hazard"; that's true, too;
5 isn't it?

6 A. Yes, we--we encourage objective research, yes, sir.

7 Q. Now, Mr. Chilcote, you'll be glad to know we're
8 moving to a different subject.

9 MR. MACDONALD: Your Honor, I move that that be
10 stricken, whether Mr. Chilcote's glad about what--where
11 they're going or where Mr. Cook's going. I move that it be
12 stricken.

13 MR. COOK: I'm sorry that I was nice to
14 Mr. Chilcote, Your Honor, and I apologize.

15 THE COURT: All right. Mr. MacDonald, your motion
16 is technically in order, so it will, therefore, be granted.

17 MR. COOK: I'd like to--

18 (Mr. Cook showed documents to counsel. A discussion
19 was held off the record.)

20 MR. COOK: Just because things are old doesn't mean
21 they're bad.

22 Q. (By Mr. Cook) Mr. Chilcote, talking about the sale
23 of--of cigarettes, you said that--I believe that you don't
24 think that cigarettes should be sold in the proximity of

1 schools?

2 A. Yes, sir. That's part of our code.

3 Q. But I--I--I didn't really ask you if that was part of
4 your program. I merely asked you if that was what you
5 thought.

6 A. Yes, sir.

7 Q. Okay. And you don't think that--that young models
8 should be used--teenage models or anything like that to sell
9 cigarettes because it might encourage youths; right?

10 A. Yes, sir.

11 Q. That you don't think that athletes should be used to
12 sell cigarettes because, is that in our society now, then,
13 perhaps forever, that athletes are--are tremendous role
14 models for children; aren't they?

15 A. Yes, they are.

16 Q. Like for example, it doesn't--if you watch on
17 television and you see who's selling Coca Cola and Diet Pepsi
18 and who sells Reeboks, and--and they're either movie stars,
19 rock stars or--or Michael Jordan-type people?

20 A. Well, and other people, too.

21 Q. But that--the--those--those people are role models
22 for our children; aren't they?

23 A. Yes, sir.

24 Q. Magic Johnson, role model for our children?

1 A. Yes, he is.

2 Q. And--do you--I--I assume that you're not particularly
3 knowledgeable about advertising?

4 A. No, sir, I'm not.

5 Q. You know that people do advertise?

6 A. Yes, sir.

7 Q. That I--I presume that you know that--that the back
8 of popular magazines is a--is a place that's frequently
9 advertised?

10 A. Yes, sir.

11 Q. Such as the Popular Science I showed you yesterday
12 with the picture of William Holden on the back because he's
13 from O'Fallon, Illinois; do you remember me showing you that?

14 A. Yes, sir.

15 Q. Okay. Do you think that's the most expensive place
16 to advertise in a magazine, is the back cover?

17 A. I--I don't know how they developed the price. I
18 would think so.

19 Q. I bet you--probably would be, though?

20 A. Yes, sir.

21 MR. COOK: I think I had one more. I wonder what I
22 did--

23 (Mr. Goold handed a document to Mr. Cook).

24 Q. (By Mr. Cook) Do you remember a movie star by the

1 name of Pier Angeli?

2 A. No, sir, I don't.

3 Q. Perhaps if you looked at the cover of Plaintiff's
4 Exhibit Number 53, you might recognize her.

5 A. I still don't. No. It might have been--well, I
6 guess it was my time.

7 Q. Do you--do you remember Life Magazine?

8 A. Yes, sir.

9 Q. And this is June the 12th, 1954?

10 A. Yes, sir.

11 Q. I'd like you to look at that for a second. You don't
12 recognize Pier Angeli?

13 A. No.

14 Q. Would you turn it over and see if you recognize the
15 person on the back?

16 A. Yes, sir.

17 Q. Who is that person? The Duke?

18 A. John Wayne, the Duke.

19 Q. John Wayne?

20 A. Yes, sir.

21 Q. And he's advertising cigarettes, right, in 1954?

22 A. Yes, sir.

23 Q. Okay. From one of the companies that is a member of
24 the Tobacco Institute?

1 A. Yes, sir.

2 Q. Let me hand you Plaintiff's Exhibit Number 51 and ask
3 you--do you remember Look Magazine?

4 A. Yes, sir, I do.

5 Q. Do you recognize who's--who's on the cover of
6 that--what's the date of that Look Magazine?

7 A. Let's see. 1958, July 8th.

8 Q. That was after the Tobacco Institute was formed;
9 right?

10 A. I don't know what month, sir.

11 Q. January.

12 A. The Tobacco Institute was formed in 1958.

13 Q. Who's the person who's on the cover?

14 A. Elizabeth Taylor.

15 Q. And would you turn it over and look to see who's on
16 the back cover?

17 MR. CRIST: Your Honor, I object. We're now
18 starting to get into things which are hearsay, if I'm
19 correct.

20 THE COURT: Well, he's just been asked to identify
21 who's on the cover. I assume that Mr. Cook's not going to
22 tell him, and he'll relate it.

23 MR. CRIST: What he's getting into is advertisements
24 that were supposedly made by companies--

1 THE COURT: I know, but that's not the question.
2 The question is who's on the cover.

3 MR. CRIST: No. He's beyond that question, Your
4 Honor.

5 THE COURT: He is?

6 MR. CRIST: Yes, sir.

7 THE COURT: I didn't hear the answer.

8 MR. COOK: I didn't hear the answer, either.

9 Q. (By Mr. Cook) Who's on the cover?

10 A. I said Elizabeth Taylor.

11 MR. CRIST: Yes.

12 MR. COOK: And "Who's on the back cover?" is the
13 next question.

14 MR. CRIST: There's an objection to that because
15 it's advertising supposedly made by some other company not a
16 party to this case without admission. It's hearsay.

17 MR. COOK: I didn't ask him what it was, but I'm
18 going to.

19 THE COURT: You said "hearsay." Do you mean
20 relevance? I don't know.

21 MR. CRIST: Yeah. It's also irrelevant and it's
22 immaterial to this case.

23 THE COURT: Let me see it.

24 MR. COOK: I'd like you to take judicial notice that

1 this is a copy of Look Magazine. If you want, I'll get it
2 certified by the Public Library.

3 THE COURT: All right. You've--you've had a
4 minute--all right. Mr. Cook, pose your question.

5 MR. COOK: Your Honor, I asked him who was on the
6 back cover. I would ask the court to take judicial notice of
7 an adjudicated fact, and unless he has some reason why you
8 should think that these aren't copies of these magazines, you
9 should do so.

10 MR. CRIST: Your Honor, I'm not taking issue that
11 those are copies of Look and Life Magazine. What I'm taking
12 objection to is he's now trying to get hearsay information
13 into evidence when it came up and it had to do with respect
14 to Reynolds, perhaps he didn't make--

15 THE COURT: All right.

16 MR. COOK: I'm not trying to prove it is true, just
17 that it was done.

18 THE COURT: It's overruled. The pending question is
19 who's on the back cover.

20 MR. CRIST: Your Honor, just--do I need to make the
21 objection again once he goes to the next question?

22 THE COURT: I guess--I would need to know.

23 MR. COOK: On the magazines, Your Honor, is that I
24 don't mind them having a continuing objection to magazine

1 advertisements as being hearsay.

2 MR. HEPLER: And relevance and materiality.

3 MR. COOK: Relevance and materiality.

4 MR. MACDONALD: And we'll join in that, Your Honor.

5 THE COURT: Then there--a continuing objection will
6 be noted.

7 MR. CRIST: Your Honor, let me make it clear. My
8 objection was simply to competitors' ads. It had nothing to
9 do with ours.

10 THE COURT: I understand.

11 Q. (By Mr. Cook) Now--

12 A. Yes, sir.

13 Q. --who's on the back of that Look Magazine?

14 A. James Arness.

15 Q. And what--do you remember what television program
16 James Arness starred in in the '50s and '60s?

17 A. Gunsmoke.

18 Q. Did you watch it?

19 A. Yes, sir.

20 Q. Do you remember--I'm going to give you a real test.
21 Do you remember what television program his brother starred
22 in?

23 A. No.

24 Q. I'll tell you; not right now. The judge will get me.

1 The--Mr. Arness is advertising cigarettes; is he not?

2 A. Yes.

3 Q. And he's advertising L & Ms; is that true?

4 A. Yes, sir.

5 Q. And L & Ms are a cigarette that's manufactured by
6 Liggett/Myer; is that also true?

7 A. Yes, sir.

8 Q. And they are a--they were and they are a member of
9 the Tobacco Institute; is that correct?

10 A. Yes, sir.

11 Q. I'm going to hand you Plaintiff's Exhibit Number 49,
12 ask you to have a--check at that one.

13 THE COURT: We'll switch at this time.)

14 * * * * *

15 (The following proceedings were reported by
16 Patricia Sullivan, C.S.R., No. 084-000785,
17 out of the presence of the Jury.)

18 THE COURT: What is it you want on the record?
19 Do you want to do it at the bench?

20 MR. MAC DONALD: Are all the jurors in, Your Honor?

21 THE COURT: I didn't count them. I will keep my eye
22 open, if you want to approach the bench and keep your voice
23 down.

24 MR. MAC DONALD: Your Honor, I would like to move

1 for a mistrial based on the Court's comments during the
2 examination of Mr. Chilcote.

3 I believe that Mr. Cook a number of times asked Mr.
4 Chilcote questions, "What was your motive for saying what you
5 said; what was the reason you said what you said," and he
6 answered those questions, and the Court indicated to the Jury
7 that it believed Mr. Chilcote was being evasive and was not
8 answering the questions and in fact had not answered the
9 question.

10 And, I believe the record will reflect, Your Honor,
11 that question was answered, was answered not only once, but
12 answered at least five or six times.

13 The question Mr. Cook asked necessarily assumes that
14 when someone says something, the reason they said it was
15 because people, because they wanted the people who heard it
16 not to believe somebody else.

17 But, what his answer was, he said he said it because
18 the Tobacco Institute had the right to take the position, had
19 a right to say it, and that is the reason it was said.

20 And he said that a number of times, and the Court
21 indicated to the Jury that that answer was not responsive to
22 the question and kept directing him to answer the question,
23 indicating that that wasn't a sufficient answer.

24 Several of the questions in fact were even open-

1 ended, asking him "What was the motive and what was the
2 reason for his answer?"

3 In addition, I also think it spills over into
4 matters that are preempted as to the warning and what would
5 people understand and what would people believe. It goes
6 into neutralizing the warning as well.

7 I think all of that is improper under Cipollone and
8 it applies to the TI as well as to Reynolds.

9 MR. CRIST: Your Honor -- and I join in that motion,
10 and I add to it these grounds, and that is Mr. Cook made
11 inflammatory comments such as, "It has been proved that Mr.
12 Kueper," on the record, was unsolicited, was not in the form
13 of a question, but for the sole purpose of trying to
14 prejudice the Jury.

15 The second additional grounds, in addition to the
16 ones that Mr. MacDonald articulated, was the Court's refusal
17 to instruct the Jury that the warnings after July, 1969 were
18 adequate to communicate to them information, adequate
19 information with respect to the relationship between smoking
20 and lung cancer.

21 So, for those four grounds, I move for a mistrial
22 also.

23 MR. NESTER: Judge, I join in the motions.

24 MR. COOK: I would only say that I thought that the

1 Court was very patient and that Mr. MacDonald's energy would
2 be better spent trying to instruct his witness to answer the
3 questions rather than to enter into a debate with me and
4 refuse to answer the questions.

5 Mr. Chilcote is one of the least responsive
6 witnesses that I have had the pleasure of examining in the
7 few years I have been doing this, and I think that the Court
8 ought to seriously consider holding Mr. Chilcote in contempt
9 as he leaves here.

10 MR. CRIST: Your Honor --

11 THE COURT: I do understand the difference of
12 opinion about whether or not Mr. Chilcote was being
13 responsive to the questions.

14 MR. CRIST: Let me finish, if I can respond to Mr.
15 Cook's comments.

16 THE COURT: I didn't pay any attention to Mr. Cook's
17 comments.

18 MR. CRIST: Your Honor, I want to make this
19 observation and that is if such a direction to the witness by
20 Mr. MacDonald was appropriate, the Court should have taken a
21 recess and asked Mr. McDonald consult with his witness,
22 rather than this Court comments itself in the presence of the
23 Jury on the manner in which the Court said Mr. Chilcote
24 wasn't responding to the questions. That is the way it

1 should have been handled, rather than having --

2 THE COURT: I disagree.

3 MR. CRIST: Rather than having --

4 THE COURT: I disagree.

5 Every time the question was posed, there would be an
6 objection. By the time we got back to rephrasing the
7 question, because the question was forgotten, then the
8 question would be rephrased, then there would be an
9 objection. It went like that a series of times.

10 We got the same answer from Mr. Chilcote. The one
11 he said repeatedly about that is the way we view it, we
12 considered it to be our right to do it. That was not
13 responsive. All right. To, that response was not responsive
14 to the question.

15 He could have said, "No, we don't agree," or, "Yes,
16 we do agree." Those are the two responsive answers in my
17 view.

18 I know you disagree, but that is for another day to
19 be decided whether I am wrong. Darlous --

20 MR. CRIST: Judge, the motion is denied?

21 THE COURT: Yes, the motion for mistrial is denied.

22 (PAUSE)

23 THE COURT: I would point out, it was not a trivial
24 matter upon which Mr. Cook was proceeding. It wasn't such

1 that there was any prejudice in asserting the same question
2 where it was constantly being avoided by the witness.

3 That is part of my ruling. Show the motion is
4 denied. Have the Jury sit down.

5 (Whereupon, the Jury was brought into the courtroom
6 and Mr. Cook continued with cross examination of
7 Mr. Chilcote.)

8 THE COURT: You may proceed.

9 CROSS EXAMINATION (continued),

10 BY MR. COOK:

11 Q I believe that we just finished with 51, and now I
12 will just hand you a couple more of these. Plaintiff's
13 Exhibit 52. That is a Life magazine with a picture of Rock
14 Hudson on the front of it?

15 A Yes, sir.

16 Q It has Brian Keith on the back.

17 A Yes sir.

18 Q Advertising cigarettes.

19 A Yes, sir.

20 Q A person known to you to be a movie star, on
21 television right now?

22 A Yes, sir.

23 Q I showed you this one, I believe, with John Wayne on
24 the back of it?

1 A Right; yes.

2 Q Then Plaintiff's Exhibit 48, which is a Collier's
3 magazine, March 29 of 1952. It shows an advertisement for
4 Lucky Strike, does it not?

5 A Yes, sir.

6 Q Lucky Strike is manufactured by whom?

7 A American Tobacco.

8 Q And they were, until just recently, were a founding
9 member of the Tobacco Institute and --

10 A I don't think they were a founding member, no, sir.

11 Q They have been a member of the Tobacco Institute?

12 A They joined a few years ago. I don't think they
13 were ever a member. And then they resigned. I think their
14 membership lasted for about two years.

15 Q We will straighten that out later. I got the
16 records here.

17 I have just given you those five magazines, Mr.
18 Chilcote, and you have been here for quite some time, and we
19 want to get you out of here today.

20 That is the type of advertising you disapprove of,
21 isn't it?

22 A Yes, we do have a code --

23 Q I didn't ask you if you have a code. You told me
24 that before.

1 That is the type of advertising Sam Chilcote
2 disapproves of; is that right?

3 A Yes.

4 Q And the reason that you disapprove of that
5 advertising is because that type of advertising might appeal
6 to children to encourage them to try the product; isn't that
7 true?

8 A No, it isn't. I don't know what advertising appeals
9 to children. I feel that --

10 Q I thought you and I just went through a big Michael
11 Jordan, Magic Johnson, Stan Musial -- I don't think we did
12 Stan. Ozzie Smith, Babe Ruth, type of discussion, where you
13 agreed that to use movie stars and athletes to promote
14 cigarette products is not a good idea to you personally
15 because it may encourage children to smoke.

16 Didn't you just get through saying that?

17 MR. MAC DONALD: Your Honor, I object to this. Mr.
18 Cook asked precisely the same question yesterday and got
19 precisely the same answer he got today, Judge. He is now
20 asking the same question all over again.

21 MR. COOK: No, I am not.

22 THE COURT: I don't recall him asking a question of,
23 related to the exhibit that is before the witness.

24 MR. MAC DONALD: Your Honor, that is why we didn't

1 object, but now he is going back to what he dealt with
2 yesterday.

3 THE COURT: I don't know what the witness has. If
4 you want to show it to me.

5 BY MR. COOK:

6 Q The only thing I am asking him is, didn't he just
7 get done saying to me before the break, before I showed him
8 the magazines --

9 You didn't say to me that you personally thought
10 that advertising shouldn't, with cigarettes, shouldn't be
11 done with athletes and movie stars because it might encourage
12 children to smoke? Did I misunderstand you?

13 A I said I didn't think it would be appropriate for
14 athletes and movie stars to be used in violation of our code,
15 and I said --

16 Q I don't care about your code, Mr. Chilcote.

17 A May I finish, sir.

18 Q No, Mr. Chilcote -- I would ask the Judge to ask if
19 the Court might direct Mr. Chilcote to answer my question. I
20 just asked, "Didn't he just tell me that."

21 If you didn't tell me that, would you for goodness
22 sakes just say no, I didn't tell you that?

23 A I don't think that is what I told you.

24 THE COURT: Direct your comments to me if you want

1 me to issue an admonition. You answered, sir?

2 THE WITNESS: I don't think that is what I said,
3 sir.

4 THE COURT: I think that is your answer. Once
5 again, listen to the phraseology of the question because it
6 appears to be important to the question that is being posed.

7 BY MR. COOK:

8 Q Mr. Chilcote, you are opposed to this type
9 advertising, but not because it might appeal to kids; is that
10 right?

11 A I am not an advertising expert.

12 Q I didn't ask you if you were an advertising agent,
13 did I? Try and listen to me for a second, will you.

14 A I don't think I am an expert in that area, sir.

15 Q Did I ask you if you were an expert in the area?

16 A Do you want me to pass judgment on advertising?

17 Q Are you an expert in any area?

18 MR. MACDONALD: I object to that. That is
19 argumentative.

20 THE COURT: The last comment of counsel and question
21 is sustained. The question is stricken.

22 MR. COOK: I ask Mr. Chilcote be instructed again to
23 answer my question.

24 THE COURT: Would you rephrase the question? There

1 were a series of them and I want to make sure the record is
2 clear.

3 BY MR. COOK:

4 Q Mr. Chilcote, Mr. Chilcote, do you think that
5 cigarette companies -- do you -- you means Sam Chilcote, it
6 means you, and I know you are not an expert, I know you are
7 not an advertising executive, I know you are from the Tobacco
8 Institute, you are the president, you are a highly paid man;

9 Do you think that the tobacco industry should
10 advertise using athletes to promote cigarettes?

11 A No.

12 Q All right. Do you only believe that because it is
13 against the voluntary code, or do you believe that because
14 personally you are concerned it might encourage children to
15 smoke?

16 A I believe it because of the, I subscribe to the
17 code. I also believe that, I don't think it makes any
18 difference to me, me personally.

19 Q It doesn't really make any difference to you if kids
20 smoke, does it?

21 A No, that is not -- we do not want children to smoke,
22 sir.

23 MR. MACDONALD: Can I request Mr. Chilcote be
24 permitted to finish the answer before he is interrupted.

1 THE COURT: Mr. Cook, instead of interrupting --

2 MR. COOK: I am sorry.

3 THE COURT: Let's adopt a procedure that you have
4 done thus far to request the Court to instruct the witness to
5 answer the question.

6 MR. COOK: All right. I am sorry.

7 THE COURT: Not cutting off what you believe is a
8 non-responsive answer.

9 MR. MACDONALD: May I ask the Court to ask Mr. Cook
10 to give Mr. Chilcote the courtesy of finishing the answer
11 before he starts asking the next question?

12 THE COURT: I think I just said that.

13 BY MR. COOK:

14 Q Mr. Chilcote, is the only reason that you are
15 concerned about them selling or promoting cigarettes around
16 schools, is that, the only reason you are concerned about
17 that is because it is against the code?

18 A No, I don't think that would be a good activity; no,
19 sir.

20 Q Okay. You don't think it would be a good activity
21 because it might encourage children to smoke; isn't that
22 correct?

23 A Yes, I -- but I don't think advertising causes
24 children to smoke, sir.

1 Q I, of course, didn't ask you that did I, Mr.
2 Chilcote. Mr. Chilcote, I was asking you about schools. If
3 you don't think that advertising causes children to smoke,
4 then why would you possibly care if John Wayne advertised
5 Camel cigarettes?

6 A You are asking me personally?

7 Q Yes. You don't care, do you?

8 A I don't think that is the reason people start to
9 smoke, sir.

10 Q You don't think. Do you know how much money your
11 industry spends on promotions and advertisement?

12 MR. CRIST: I object. This is an area clearly
13 preempted and Mr. Cooks knows it.

14 MR. MACDONALD: Join, Your Honor.

15 THE COURT: Objection is sustained.

16 MR. COOK: May I approach the bench?

17 THE COURT: Yes.

18 (Whereupon, the following was had at the bench,
19 out of the hearing of the Jury.)

20 MR. COOK: I don't understand the Court's ruling.
21 They objected to preemption. Preemption does not apply to
22 the Tobacco Institute.

23 MR. CRIST: He didn't ask about the Tobacco
24 Institute advertising.

1 MR. COOK: And it is relevant to the issue at hand.

2 THE COURT: Why do you think it is relevant.

3 MR. COOK: Because, Judge, they advertised and spent
4 a lot of money back then when my client was starting to
5 smoke. He has testified that he doesn't think --

6 MR. MACDONALD: You are talking too loud.

7 MR. COOK: I don't care what you think. Address
8 your comments to the Judge.

9 THE COURT: I will address it. If I think there is
10 a problem. Don't interrupt, Mr. MacDonald. If I think he is
11 talking too loud, I will tell him. I don't think he was too
12 loud.

13 MR. COOK: The amount of money they spent on
14 promotions and advertising, Your Honor, is the essence of the
15 cause of action. Section 880 of the restatement of torts--

16 THE COURT: Let's get to the issue of, that has to
17 do with preemption. If their advertising cannot be a basis
18 for imposing liability, what is the relevance or materiality
19 of their advertising budget?

20 MR. COOK: Their advertising budget, if they
21 advertise to encourage children, which they did, according to
22 him, he has now renounced it, but what he said before is that
23 they shouldn't advertise like that because it would encourage
24 children to spend money.

1 advertising is false. They encourage people to smoke. Their
2 use of promotions and advertising of cigarettes. My
3 preemption claim is based on encouraging him to smoke
4 cigarettes.

5 MR. CRIST: He didn't ask him about the budgets.
6 Those questions were to the company before 1969. He said
7 what are they now.

8 Additionally, now, your Honor, as the Court pointed
9 out, the claims, such claim is predicated on the state law
10 prohibiting -- (inaudible) --

11 Mr. Cook has not said this is a false advertisement,
12 how much money was spent on it?

13 MR. COOK: You want me to, I will plead that.

14 MR. CRIST: You can't. That is common law fraud.

15 MR. COOK: Who says I can't?

16 MR. CRIST: There is no --

17 MR. COOK: Who says?

18 THE COURT: Okay. Stop it.

19 All right. The objection remains sustained to that
20 question.

21 (Whereupon, the following proceedings were had in
22 the presence and hearing of the Jury.)

23 BY MR. COOK:

24 Q I believe you have already said this is the type of

1 advertising you don't approve of; is that right?

2 A This is the type of advertising that our industry
3 does not --

4 Q Now, now -- is there a -- Mr. Chilcote -- now, you
5 have been here for two -- Your Honor, could you instruct him
6 to answer my questions, please?

7 MR. MACDONALD: I just object to the kinds of
8 questions. He asks him questions sometimes about you, and
9 you as Mr. Chilcote, and sometimes about you as the Tobacco
10 Institute.

11 THE COURT: Mr. Cook, rephrase it with reference to
12 whether --

13 MR. COOK: Now, Mr. Chilcote -- Excuse me, Judge.

14 THE COURT: Go right ahead.

15 BY MR. COOK:

16 Q Mr. Chilcote, you means you, Mr. Chilcote from
17 Washington, D.C.; okay?

18 A Yes, sir.

19 Q This is the type of advertising you, Mr. Chilcote,
20 do not approve of?

21 A I don't have an opinion on it.

22 Q Oh.

23 A I don't think it makes any difference.

24 Q That is all you have to say. We are not --

1 A I don't have an opinion.

2 Q You don't have any opinion about this at all, one
3 way or the other?

4 A I don't think advertising necessarily causes people
5 to buy a product. I go through a magazine every day and
6 don't go out and buy that product.

7 Q That's fine.

8 A I think it is a battle of the brands, really.

9 Q Sure, Mr. Chilcote.

10 A I am glad we agree on something, Mr. Cook.

11 Q We agree on quite a bit probably. So, you don't
12 really have any objection to, personally, to Michael Jordan
13 or Larry Byrd advertising cigarettes?

14 A Me personally?

15 Q Yes.

16 A No, sir.

17 Q And/or Babe Ruth or Stan Musial, Lou Gehrig, whoever
18 we had around here. We had some good Cardinals. You don't
19 follow the Cardinals, do you?

20 A Yes, sir.

21 Q You do follow the Cardinals? Solly Hemus?

22 A Yes, sir.

23 Q Jerry Staley?

24 A No.

1 Q Twenty game winner for the Cardinals?

2 A No.

3 Q How about Howard Paulette? Remember him. We got a
4 nice Camel ad by Howard, so does somebody else.

5 Do you remember Joe Torre?

6 A No, sir.

7 Q You follow the Cardinals real close?

8 A Just -- no, not real close, but I follow them.

9 Q He is their manager.

10 A Oh.

11 Q He was the most valuable player in 1982.

12 A All right.

13 MR. MACDONALD: Not 1982.

14 MR. COOK: I am not sure what year. I said it was -

15 -

16 MR. HEPLER: I think he was in Atlanta that year
17 managing against us.

18 BY MR. COOK:

19 Q Bob Gibson? Do you know Bob?

20 A Was there a Larry King.

21 Q Larry King is on CNN.

22 A No, not the same one.

23 THE COURT: Are we done visiting here?

24 (Pause)

1 Q Do you know why the tobacco industry has adopted
2 this voluntary code? Is it just for cosmetic effects?

3 A No, sir.

4 Q Do you know why they have?

5 A Yes.

6 Q Why?

7 A I think that the tobacco industry did not want
8 anyone to misinterpret their advertising. It is a battle of
9 the brands, and so they adopted this code to send up loud and
10 clear that they are not trying to sell to minors, as I have
11 said consistently.

12 They put in a sampling code, that doesn't allow
13 under 21 to be sampled.

14 In addition to that, they put in another layer of
15 caution, I guess you would call it, on the part of which
16 models are used. Those are the reasons for --

17 Q Are you really suggesting to me that the tobacco
18 companies do all this advertising because they don't want
19 people to smoke?

20 MR. CRIST: I object again --

21 THE WITNESS: Yes, sir.

22 MR. CRIST: Preemption.

23 THE COURT: Sustained.

24 THE WITNESS: I really didn't understand that

1 question.

2 BY MR. COOK:

3 Q This advertising, I mean --

4 A No, it's a battle of the brands.

5 Q Now, here, I want you to answer my questions.

6 A I am trying to.

7 Q Are you suggesting to me that the tobacco industry
8 is spending all the money to buy the back cover of Life
9 magazine, October 3, 1952, because they don't care if people
10 smoke?

11 A No, they want to preserve --

12 Q I didn't ask you what they want. I want you to
13 answer my question.

14 A Well, all right.

15 Q Do they want people to smoke?

16 A They would like people that are smokers to smoke,
17 yes, sir.

18 Q Do they want people to start smoking?

19 A I don't know.

20 Q Now --

21 A I am sure --

22 Q If people don't start smoking?

23 A I think they would like to have people to use their
24 product like any. They are in the business, why not?

1 Q That is the point. We are not arguing. They are in
2 the business. They want people to use their product.

3 A Yes, sir.

4 Q If no one starts smoking, if we go 15 years without
5 people starting smoking, we will have 15 years of people
6 dying for whatever reason, not being replaced by people that
7 smoke, that would be catastrophic to the tobacco industry,
8 wouldn't it?

9 A If people stopped smoking?

10 Q No, I didn't say if people stopped smoking. I said
11 if no one started smoking.

12 A If no one started smoking.

13 Q If we went a decade in this country

14 A Obviously --

15 Q --and no one started smoking --

16 A Obviously --

17 Q And no one started smoking --

18 A Obviously, yes.

19 Q It would be terrible to the tobacco industry?

20 A They wouldn't be in business.

21 Q They would be out of business?

22 A Yes, sir.

23 Q You and I can agree the tobacco industry wants
24 people to start smoking, not minors, I know you are going to

1 say that, but they want people to start smoking?

2 A Yes.

3 Q And not because it is good for the people, but
4 because it is good for the company; they don't know whether
5 it is good for the people or not, do they?

6 A They are in the tobacco business. They would like
7 to sell their product, yes.

8 Q Good for the company, and we don't know --

9 A It is part of the American way.

10 Q Part of the American way.

11 I am going to hand you Plaintiff's Exhibit 15B and
12 ask you if you would look at that, sir.

13 A It is another old document, sir.

14 Q Another old document.

15 A August 19, 1970. That is before --

16 Q How old are you, sir?

17 A I am 55, sir.

18 Q And in 1970 you were what? 33?

19 A Yes, sir.

20 Q So, 33 years old?

21 A Yes, sir, 33.

22 Q It isn't that old. You were a fully formed adult?

23 A Yes, sir.

24 Q My client in 1970 when that was published was four

1 years younger than you are. He would have been 27.

2 MR. CRIST: I object to Mr. Cook trying to make any
3 connection between this document and his client.

4 THE COURT: Overruled.

5 BY MR. COOK:

6 Q That, sir, which you say is another old document, is
7 a document made by Mr. Kornegay, your predecessor; is that
8 true?

9 A This is a document before my time, yes, sir. Yes,
10 made by Horace Kornegay.

11 Q Did I ask if it was made before your time, sir?

12 A Well --

13 Q You probably want to get back to Washington.

14 A No, I am not going back to Washington.

15 Q Wherever you are going.

16 I got the wrong page.

17 THE COURT: What is that exhibit? What is the
18 number on it?

19 THE WITNESS: Your Honor, it is Horace -- it is,
20 15B.

21 BY MR. COOK:

22 Q I will show you page six again of 15A. Does the
23 Court have 15A? He may have it in front of him.

24 A It is right here, In fact, you way want -- would

1 you like these back, Mr. Cook?

2 Q Thank you.

3 A Do you want me to keep these two?

4 Q Yes, sir, please.

5 I would like you to look at page 6 of 15A. That is
6 the statement that Mr. Kornegay gave. We went through so
7 laboriously, where he talked about what you do?

8 A 15A?

9 Q Yes.

10 A What page, sir?

11 Q Page six.

12 Q You recall that document being the one where Mr.
13 Kornegay said what you guys do?

14 A Yes, sir.

15 Q And you said that you pretty much -- well, do the
16 same now, as he did then?

17 A Yes, sir, that is correct.

18 Q You will notice that, he talked about the fact he
19 was talking about some initials he has to deal with? The
20 FTC, FCC, CAB, the FAA and the ICC; right?

21 A Yes, sir.

22 Q If you would refer -- there is another set of
23 initials on the document, 15B, that he is talking about other
24 than the FTC, the FCC, CAB, FAA and ICC.

1 Could you tell me what that other set of initials
2 are in that document, sir?

3
4 A 15B?

5 Q Yes, sir.

6 A We have HEW. Is that what you are referring to?
7 FTC. The ones you got marked in yellow?

8 Q Yes, sir.

9 A FCC, PTA.

10 Q PTA?

11 A Yes, sir.

12 MR. CRIST: Does Mr. Cook have an extra copy of
13 these or is that the only copy?

14 MR. COOK: This is the only copy.

15 MR. CRIST: This has not been admitted.

16 THE COURT: I believe it was.

17 MR. CRIST: I don't believe it has.

18 MR. COOK: I would move its admission.

19 THE COURT: I thought it had been admitted.

20 MR. COOK: I move its admission.

21 (Pause)

22 THE COURT: Do you want to comment on it?

23 (Pause)

24 MR. COOK: May we approach the bench?

1 (Whereupon, a conference was had at the bench, out
2 of the hearing of the Jury and the reporter.)

3 MR. COOK: I move the admission of 15B, Your Honor.

4 THE COURT: Comments?

5 MR. MAC DONALD: Objection. Relevancy, Your Honor;
6 materiality.

7 THE COURT: All right. Admitted, noted, and
8 overruled.

9 (Plaintiff's Exhibit 15B received in evidence.)

10 BY MR. COOK:

11 Q This was a talk that he gave to the Rotary Club in
12 Washington, D.C. on August 19, 1970; Mr. Kornegay?

13 A Yes, sir.

14 Q Is he the man who hired you?

15 A No, the executive committee hired me.

16 Q Did he participate in the interview process?

17 A No, sir.

18 Q The only portion of that document that I am
19 particularly interested in is that Mr. Kornegay, when he was
20 talking to the Rotary Club in Washington, D.C. on August 19,
21 1950, stated:

22 "We have had a full-time job jousting with the HEW
23 and the FTC and the FCC and the PTA and the AMA, these folks,
24 to name a few, these folks make those Carthaginians who faced

1 old Horatio look like a bunch of badminton players by
2 comparison."

3 Have you found the PTA that tough?

4 A No, sir, I haven't.

5 Q Now, the only issue why you would joust, the Tobacco
6 Institute would joust with the PTA would be on the issue of
7 children smoking; isn't that true?

8 A I think our position with the PTA on whether
9 children smoke would be the same, sir.

10 Q Then you can't think of any reason why old Horace
11 had to fight with the PTA then, can you? That is what
12 jousting is, fighting?

13 A I am sure what jousting is. I don't know what
14 Horace, in that time frame, what the disagreement was, sir.
15 I really don't know.

16 Q The only issue that you know of involving the PTA
17 and your institute involves kids and cigarettes; isn't that
18 right? I mean, the PTA is not a health agency?

19 A That is correct.

20 Q And the PTA, though, is interested in children?

21 A Yes, sir.

22 Q And, so, if he has to joust with the PTA, it would
23 be reasonable for you to conclude it was something involving
24 kids and smoking?

1 MR. MAC DONALD: I object. He is asking him to
2 speculate about Mr. Kornegay and he said he didn't know.

3 MR. CRIST: I will join in that objection.

4 THE COURT: It is overruled.

5 (Pause)

6 BY MR. COOK:

7 Q All right.

8 A I don't know why there would be a problem with the
9 PTA at that time, Mr. Cook. If you tell me the specific
10 proposal--

11 Q Well, I talked to you before about vending machines.
12 I told you in 1977 they asked they be restricted and banned?

13 A I told you -- we spent a lot of time on this. The
14 industry opposed to have bans; we don't oppose restriction,
15 sir.

16 Q You don't oppose restrictions now, sir.

17 MR. CRIST: I object to Mr. Cook testifying.

18 THE WITNESS: That is correct.

19 MR. MAC DONALD: Asked and answered too.

20 THE COURT: Overruled.

21 BY MR. COOK:

22 Q And that has been your policy since 1959. In 1958
23 it was different. In 1988 it was different, wasn't it?

24 MR. MAC DONALD: I object to this insofar as it has

1 been asked and answered yesterday several times that same
2 issue of the vending machines and the PTA.

3 THE COURT: The last question was asked and answered
4 yesterday. The objection is sustained.

5 BY MR. COOK:

6 Q The next page. Would you read the first sentence on
7 the next page after he is talking about PTA and FAA and FTC
8 and FCC and ICC? Would you read that?

9 A "From our point of view, they are indeed the best of
10 professional athletes in the fine old sport of jumping to
11 conclusions."

12 Q I guess you wouldn't know what kind of conclusions
13 the old PTA had been jumping to?

14 A No, sir.

15 Q You do know what kind of conclusions the old AMA has
16 been jumping to?

17 A No, sir, I don't know about the old AMA either.

18 Q What about the FTC?

19 A I do not know what conclusions they were jumping to
20 at that time. I don't know what the issues were with these
21 groups, sir.

22 Q I will just take one more minute of your time, sir.

23 A Take as much time as you want.

24 Q All right then, I will do that. It is very nice of

1 you. (Pause)

2 Do you remember, while I look for it, what the FTC
3 wanted to do prior to 1969?

4 A No, sir.

5 Q Do you remember reading and going through with me
6 this morning the fact they wanted a death notice placed in
7 cigarette advertising?

8 MR. MAC DONALD: Your Honor, I object. It has been
9 asked and answered subsequently asked and answered.

10 THE COURT: I think it is preliminary to something,
11 to another question.

12 MR. COOK: I am trying -- he said he didn't know
13 what conclusions the FTC was jumping to.

14 BY MR. COOK:

15 Q Don't you think that page eight of 15A, which states
16 that the warning that the FTC wanted placed on advertising,
17 saying:

18 "Cigarette smoking is dangerous to your heath and
19 will cause death from lung cancer, coronary heart disease,
20 bronchitis, emphysema, and other diseases;"

21 That is their conclusion, isn't it?

22 MR. CRIST: Your Honor, I object. This is based on
23 a 1970 document Mr. Cook knows the issue is preempted.

24 MR. COOK: That is a --

1 THE COURT: Excuse me. Is that 15A?

2 MR. CRIST: 15B, Your Honor.

3 MR. COOK: I was talking about 15A. You will have
4 to keep up with the program, Mr. Crist.

5 THE COURT: Mr. Cook, there is no need to instruct
6 counsel on what he should and shouldn't do. 15A is I
7 believe, a 1981 interview.

8 THE WITNESS: It is 1975, Your Honor. I have the
9 document here. Maybe that is the reason it is lost.

10 THE COURT: Okay. You are showing him what?

11 MR. COOK: I am showing the document and the warning
12 that the FTC wanted placed on advertising prior to
13 preemption, Your Honor.

14 THE COURT: That is 15A and dated what?

15 THE WITNESS: 1975.

16 THE COURT: All right. That is a 1975 document.

17 MR. COOK: But he is referring to a period of time
18 before preemption.

19 THE COURT: What is the date of the document here
20 where they list the string of initials?

21 MR. COOK: 1970.

22 MR. CRIST: 1970. Your Honor, what he has now done
23 is --

24 THE COURT: All right. The objection is sustained.

1 BY MR. COOK:

2 Q The FTC prior to 1969 wanted to put a death notice
3 on cigarettes; that is true, isn't it?

4 A I do not know, sir.

5 Q Mr. Kornegay said it was true in 1975, didn't he,
6 sir?

7 MR. MACDONALD: Your Honor, I object.

8 THE COURT: Overruled.

9 MR. CRIST: This is preemption. This is a different
10 issue.

11 THE COURT: The question is did Mr. Kornegay say in
12 1975 whether the surgeon general, the FTC --

13 MR. COOK: This is prior to preemption.

14 THE COURT: Wanted to do that in 1969.

15 MR. CRIST: I understand that, but that is
16 preempted.

17 THE COURT: I disagree.

18 MR. CRIST: Can I approach the bench. It is a
19 separate issue. One Cipollone decides.

20 THE COURT: Okay. Come on up.

21 (Whereupon, the following proceedings were had at
22 the bench, out of the hearing of the Jury.)

23 MR. CRIST: The issue that Cipollone decided was
24 whether or not common law claims were preempted. The statute

1 explicitly provides and the supreme court specifically
2 recognizes that administrative action or legislative action
3 would be preempted beginning in 1966, but common law
4 preemption did not kick in until July, 1969.

5 (Pause)

6 THE COURT: Can I see the Kornegay --

7 (Pause)

8 MR. COOK: I don't believe this proves, Your Honor,
9 that this regulation -- the warning was published in 1965.

10 MR. MAC DONALD: He didn't deal with it in the 1964
11 and 1965 context. He dealt with it in the 1969 context.

12 THE COURT: Then I will say in 1965.

13 MR. CRIST: Here, Your Honor, page 11.

14 That couldn't possibly be preempted for the Tobacco
15 Institute.

16 (Pause)

17 THE COURT: Okay. Your point.

18 MR. CRIST: That the 1969 act, the supreme court
19 held preempted common law claims.

20 The supreme court deals with the 1965 act and says:
21 "Thus, on their face, these provisions merely prohibited
22 state and federal rule making bodies from mandating
23 particular cautionary statements on cigarette labels or in
24 cigarette advertisements."

1 So, it was preempt by the trade commission; so there
2 was preemption from the federal trade commission.

3 THE COURT: I understand your point. (Pause) All
4 right the objection is overruled.

5 MR. MACDONALD: We join in the objection, too.

6 THE COURT: Noted and overruled.

7 MR. NESTER: We join, too.

8 THE COURT: Noted and overruled.

9 (Whereupon, the following proceedings were had in
10 the presence and hearing of the Jury.)

11 THE COURT: Did you want the court reporter to
12 search for the last question?

13 MR. COOK: No, Your Honor.

14 THE COURT: Let's move on then.

15 MR. COOK: We will really move on, Judge.
16 That is all the questions I have of Mr. Chilcote.

17 THE COURT: All right.

18 MR. MACDONALD: Do you want me to begin?

19 THE COURT: What time do we have? You can have a
20 few moments to get up your thoughts. We will take a break
21 for 15 minutes and be back at ten to four.

22 (Whereupon a short recess was taken.)

23 * * * * *

24 (The following proceedings were taken by

1 Karen Landrum, C.S.R.)

2 THE COURT: All right. Ladies and Gentlemen, do you
3 want to --

4 MR. COOK: I don't want to do anything.

5 THE COURT: I guess that means we're going to break
6 a little bit early. Once again, you're advised not to
7 discuss the case amongst yourselves or with anyone else. You
8 are allowed to leave at this time. Just put your notes on
9 your seats. We'll be back ready to begin at nine o'clock on
10 Monday.

11 I'll repeat myself. We will not be in session
12 Wednesday, or Thursday or Friday. Were there any questions
13 about that? Mr. Ratka?

14 JUROR RATKA: Some of us work, and beings that we
15 are off on a jury duty, the week of time would be from the
16 time we start 'til the time we absolve the problem or bring
17 in the verdict. How is this going to affect us by not being
18 here on Wednesday?

19 THE COURT: I'm not sure I understand.

20 MR. CRIST: Does he have to go to, back to work on
21 Wednesday?

22 MR. COOK: They're still impaneled.

23 THE COURT: I don't see any prohibition. If you
24 want to go to work, you can.

1 UNIDENTIFIED JUROR: With my job, it's the main
2 problem. What he's asking -- are we required?

3 THE COURT: You're not required to go to work.

4 UNIDENTIFIED JUROR: So, even if it would be a
5 normal day, we would not be required to go to work because
6 we're not on a jury status?

7 THE COURT: You won't be paid for jury service on
8 that date, but you are free to say that you're still
9 impaneled, and you're not required to go to work as far as I
10 can tell. That would be a matter between you and your
11 employer.

12 MR. COOK: May I approach the bench?

13 (Whereupon, a discussion was had at the bench out
14 of the hearing of the Jury and the reporter.)

15 THE COURT: It may be an open issue as to whether
16 you get paid for Wednesday or not. I'm not sure, but we
17 won't be in session. You are impaneled and you can advise
18 your employer that as such you aren't required to go to work.
19 They can't require you to work because there's a corollary to
20 that one. You're on jury duty. Mr. Lord?

21 JUROR LORD: Do you know if there's any law on the
22 books as far as them having to pay me?

23 THE COURT: That's between you and your employer,
24 sir.

1 JUROR LORD: There's no law requiring them to pay
2 me?

3 THE COURT: No, there's no mandatory payment of
4 wages. Okay. Nine o'clock Monday. Thank you very much,
5 Ladies and Gentlemen.

6 Let's show Exhibit 16A as admitted.

7 (Plaintiff's Exhibit No. 16A received into
8 evidence.)

9 (Whereupon, court adjourned, to reconvene Monday,
10 November 23, 1992 at the hour of 9:00 A.M.)
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